143-60

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 169.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY (OTHERWISE CALLED THE ERIE RAILROAD COMPANY), PLAINTIFF IN ERROR,

vs.

DAVID T. WINTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

Seal of the Circuit Court, Massachusetts.

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between David T. Winter, of Peabody, in the county of Essex and Commonwealth of Massachusetts, plaintiff, and New York, Lake Erie and Western Railroad Company, otherwise called The Erie Railroad Company, a corporation established under the laws of a foreign jurisdiction and having a place of business in said Commonwealth, defendant, in an action of tort, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears—

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twentieth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
THOS. L. NELSON, *Dist. Judge.*

2 Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith under the seal of the said circuit court a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this thirtieth day of June, A. D. 1888.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, before the Honorable Le Baron B. Colt, circuit judge.

DAVID T. WINTER, of Peabody, in the County of Essex and Commonwealth of Massachusetts, Plaintiff,

v.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD Company, Otherwise Called The Erie Railroad Company, a Corporation Established under the Laws of a Foreign Jurisdiction and Having a Place of Business in said Commonwealth, Defendant.

No. 2749. Law Docket.

In an action of tort.

The writ in this cause is dated the first day of May, A. D. 1885, and is made returnable before the justices of the superior court of the Commonwealth of Massachusetts, then next to be holden at Salem, within and for the county of Essex, on the first Mon-
4 day of June, A. D. 1885, and was removed from said superior court upon petition of defendant, filed and allowed in said superior court, and duly entered here at the October term, A. D. 1886, when and where the parties appeared by their respective attorneys.

Upon the entry of said cause certified copies of the papers on file and of the record of said cause in said superior court were filed in the words and figures following:

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } ss:

[L. S.] To the sheriff of any county in the said Commonwealth or his deputy, Greeting:

We command you to attach the goods or estate of the New York, Lake Erie and Western Railroad Company, otherwise called the Erie Railroad Company, a corporation established under the laws of a foreign jurisdiction and having a place of business in said Commonwealth, to the value of ten thousand dollars, and summon

the said defendant corporation (if it may be found in your precinct) to appear before our justices of our superior court, next to be holden at Salem, within and for our said county of Essex, on the first Monday of June next, then and there, in our said court, to answer unto David T. Winter, of Peabody, in said county of Essex, in an action of tort, to the damage of the said plaintiff, as he says, the sum of ten thousand dollars, which shall then and there be made to appear with other due damages.

And whereas the said plaintiff says that the said defendant has not in its own hands and possession goods and estate to the value of ten thousand dollars aforesaid which can be come at to be attached, but has intrusted to and deposited in the hands and possession of the Fitchburg Railroad Company, the Boston and Albany Railroad Company, the New York and New England Railroad Company and Charles P. Clark, receiver of the property thereof; the Boston and Lowell Railroad Corporation, and the Boston and Maine Railroad Corporations, established under the laws of said Commonwealth, and the last two having a usual place of business at said Salem, trustees of said defendant's goods, effects, and credits to the said value:

We command you, therefore, that you summon the said trustees, if they may be found in your precinct, to appear before our justices of our said court, to be holden as aforesaid, to show cause (if any they have) why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects, or credits in the hands and possession of them, the said trustees; and have you there this writ with your doings therein.

Witness Lincoln F. Brigham, Esquire, at Salem, the first day of May, in the year of our Lord one thousand eight hundred and eighty-five.

DEAN PEABODY, *Clerk.*

SUFFOLK, *ss:*

BOSTON, *May* 2, 1885.

By virtue of this writ, I this day, at 45 minutes past 11 o'clock a. m., summoned the within-named Boston and Maine railroad; and at 11.55 o'clock a. m., the within-named Fitchburg Railroad Company; and at 12 o'clock m., the within-named Boston and Lowell Railroad Corporation; and at 12.30 o'clock p. m., the within-named New York and New England Railroad Company; and at 12.45 o'clock p. m., the within-named Boston and Albany Railroad Company; and May 4th, 1885, the within-named Charles P. Clark, each and all to appear and show cause at court, as within directed, by delivering to said Charles P. Clark, in hand, and to Amos Blanchard, treasurer of said Boston and Maine railroad, and to M. D. Benson, treasurer of said Fitchburg Railroad Company, and to C. E. A. Bartlett, treasurer of the said Boston and Lowell Railroad Corporation, and to George B. Phippin, treasurer of the said New York and New England Railroad Company, and to Charles E. Stevens, treasurer of said Boston and Albany Railroad Company,

each an attested copy of this writ, and May 16, 1885, I attached a chip as the property of the within-named defendant corporation, and summoned it to appear and answer at court, as within directed, by delivering to Oliver W. Jordan, as its agent (he being the person in charge of its business at the time of said service and the only agent or attorney of said defendant I could find within my precinct), an attested copy of this writ.

THOMAS FEE, JR.,
Deputy Sheriff.

Fees, $12.10.

7 ESSEX, *ss:*

Superior Court, June Term, 1885.

DAVID T. WINTER
vs.
NEW YORK, LAKE ERIE & WESTERN R. R. & TRUSTEES.

Declaration.

And the plaintiff says the defendant is and was in the month of February, 1882, a common carrier of passengers from New York to Dunkirk, in the State of New York; that on the thirteenth day of said month of February he was the owner of an unlimited first-class ticket entitling him to carriage from Binghamton to Salamanca, on the railroad of said defendant, and that on said thirteenth day of February he took a train of said defendant at said Binghamton to be carried to said Salamanca; that between said Binghamton and Olean, on said defendant's road, the defendant's agent in charge of said train punched his said ticket at his request, so that he was entitled to "stop over" at said Olean, and returned said ticket to the plaintiff; that he did stop over at said Olean, and on the fourteenth day of said February took a train on the defendant's road at that place to be carried thence to Salamanca, by virtue of his ticket punched as aforesaid; that the defendant's agent in charge of said last-named train refused to accept said ticket and demanded payment of a cash fare from said Olean to said Salamanca, and upon his (the plaintiff's) refusal to pay such fare forcibly ejected him from the car in which he was riding and forcibly removed him from the defendant's said train; and the plaintiff further says that by means of said forcibly ejectment his finger

8 was broken and he sustained other severe and painful injuries; that his luggage and apparel were taken away on said train, and that he was thereby deprived of certain valuable papers, and that the place where he was ejected as aforesaid was a great distance from any public house; that it was at a very late hour of the night, and that the weather was very cold and inclement; all of which was the occasion of great suffering to the plaintiff both in body and in mind.

2nd count. And the plaintiff further says that the defendants, by their agents and servants, made an assault upon him and ejected

him from the cars in which he was lawfully travelling and in which he had the lawful right to travel, and did him serious personal injury and subjected him to great personal indignity.

By his attorney, GEO. B. IVES.

Trustee's Answer.

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

Superior Court, June Term, 1885.

DAVID T. WINTER
vs.
N. Y., LAKE ERIE & WESTERN R. R. Co.

Answer of N. Y. & N. E. R. R. Co., Alleged Trustee.

And now the New York and New England Railroad Company, summoned as trustee of the principal defendant in the above-entitled action, appears and makes answer that at the time of the service of the plaintiff's writ upon him he had not in his hands or possession any goods, effects, or credits of the said defendant.

9 Wherefore he prays that he may be discharged and for his costs.

NEW YORK AND NEW ENGLAND R. R.
GEO. W. LITTLE, *Paymaster.*

MAY 29, 1885.

Then the above-named Geo. W. Little appeared and made oath that the foregoing answer subscribed by him is true.

Before me—

WILLIAM CALEB LORING,
Justice of the Peace.

ESSEX, *ss:*

Superior Court, June Term, 1885.

DAVID T. WINTER
v.
N. Y., LAKE ERIE & WESTERN R. R. Co.

Special Appearance of Charles P. Clark, Alleged Garnishee, to Object to the Jurisdiction of the Court.

And now comes Charles P. Clark, and, appearing specially for the purpose of objecting to the jurisdiction of this court, suggests to this honorable court that, by a decree of the circuit court of the United States for the second circuit and district of Connecticut, duly made in a suit therein pending, entitled Henry A. Brassey *vs.* The New York and New England Railroad Company, he was duly appointed receiver of all and singular the railways and other property

of the said New York and New England Railroad Company and has taken possession of the same as such receiver.

Wherefore he prays that this writ may be abated.

By his attorney, WILLIAM CALEB LORING.

10 *Trustee's Answer.*

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

Superior Court, June Term, 1885.

DAVID T. WINTER
v.
N. Y., L. E. & W. R'Y CO. & TR'S.

Answer of the Boston & Lowell Railroad Corporation, Alleged Trustee.

And now the Boston and Lowell Railroad Corporation, summoned as trustee of the principal defendant in the above-entitled action, appears by Charles E. A. Bartlett, its treasurer, and makes answer that at the time of the service of the plaintiff's writ upon the said corporation it had not in its hands or possession any goods, effects, or credits of said defendant, and of this the said Charles E. A. Bartlett submits himself to examination upon his oath.

Wherefore the said corporation prays that it may be discharged, and for its costs.

C. E. A. BARTLETT,
Treasurer Boston & Lowell R. R.

SUFFOLK:

BOSTON, *June*, 1885.

Then the above-named Charles E. A. Bartlett made oath that the foregoing answer subscribed by him is true.

Before me—

WILLIAM H. COOLIDGE,
Justice of the Peace.

11 *Trustee's Answer.*

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

Superior Court, June Term, 1885.

DAVID T. WINTER
v.
N. Y., LAKE ERIE & WESTERN R. R. & TR'S.

Answer of alleged trustee, the Fitchburg R. R. Co.

And now the Fitchburg Railroad Company, by its treasurer, summoned as trustee of the principal defendant in the above-entitled action, appears and makes answer that at the time of the service of

the plaintiff's writ upon it it was engaged in business transactions with the principal defendant, the accounts and receipts of which business are kept at divers places and by divers persons, and until full returns of such accounts and receipts are made the said alleged trustee is unable to state the amount of its indebtedness to the principal defendant, if any, and prays leave to answer further when such returns are made, at some time during the month of June, 1885; and, except as above stated, it had not at said time of service any goods, effects, or credits of said defendant in its hands or possession, and of this it submits itself to examination upon oath.

M. D. BENSON, *Treasurer.*

SUFFOLK, *ss:*

JUNE 4, 1885.

Then the above-named Mason D. Benson, treasurer as aforesaid, made oath that the foregoing answer subscribed by him is true.

Before me—

THOMAS WHITTEMORE,
Justice of the Peace.

12 *Trustee's Answer.*

COMMONWEALTH OF MASSACHUSETTS, *Essex,* } *ss:*

Superior Court, June Term, 1885.

DAVID T. WINTER
v.
N. Y., LAKE ERIE & WESTERN R. R. CO. & TR.

Answer of alleged trustee.

And now the Fitchburg Railroad Company, summoned as trustee of the principal defendant in the above-entitled action, appears and makes answer that at the time of the service of the plaintiff's writ upon it it was owing the principal defendant the sum of fifteen hundred and sixty-seven dollars and ninety-seven cents, but had not at said time of service any other goods, effects, or credits of said defendant in its hands or possession, and of this it submits to examination upon oath.

THE FITCHBURG RAILROAD CO.,
By M. D. BENSON, *Treasurer.*

SUFFOLK, *ss:*

JUNE 24, 1885.

Then the above-named Mason D. Benson, treasurer as aforesaid, made oath that the foregoing answer subscribed by him is true to the best of his knowledge and belief.

Before me—

THOMAS WHITTEMORE,
Justice of the Peace.

13 *Trustee's Answer.*

ESSEX, *ss:*

Superior Court, Vacation After June T., 1885.

DAVID T. WINTER
v.
N. Y., LAKE ERIE & W. R. Co. & B. & M. R. R. *& als.*, Tr's.

Answer of the Boston & Maine R. R., summoned as trustee.

And now comes the Boston & Maine Railroad, summoned as trustee of the defendant in the above-entitled action, by Amos Blanchard, its treasurer, who on oath says that at the time of the service of the writ upon him in said action it had not in its hands or possession any goods, effects, or credits of said defendant, and of this it submits itself to examination upon oath and prays to be discharged, and for its costs.

BOSTON & MAINE RAILROAD,
By A. BLANCHARD, *Treasurer.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

JULY 1ST, 1886.

Subscribed and sworn to before me—
DOUGLAS FRAZAR, *J. Peace.*

14 *Trustee's Answer.*

COMMONWEALTH OF MASSACHUSETTS, *Essex,* } *ss:*

Superior Court, June Term, 1885.

DAVID T. WINTER
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY and BOSTON AND ALBANY RAILROAD COMPANY, Trustee.

Trustee's answer.

The Boston and Albany Railroad Company, summoned as trustee in the above-entitled action, answering therein, says that when plaintiff's process was served on it it had in its possession at Worcester, in our county of Worcester, one box freight car, and otherwise had not in its hands, possession, or control any goods, effects, or credits of the principal defendant, and it is informed and believes that said freight car is covered by divers mortgages made by the principal defendant to trustees for the security of bondholders, or is owned by a car-trust association and not by the principal defendant.

Wherefore this respondent, making this answer, by Henry T.

Gallup, general freight agent, prays that it may be herein discharged.

BOSTON AND ALBANY R. R. CO.,
By HENRY T. GALLUP,
Gen'l Fr't Agent.

SUFFOLK, *ss:*

JULY 7TH, 1885.

Subscribed and sworn to before me—

C. E. STEVENS,
Justice of the Peace.

15 *Motion for Supplementary Process.*

ESSEX, *ss:*

Superior Court, September Sitting, 1885.

DAVID T. WINTER
v.
N. Y., L. E. & W. R. R. Co.

Motion for supplementary attachment under P. S., ch. 161, sect. 85.

And now comes the plaintiff in said case and says that upon the original writ in this case funds of the defendant to the amount of about $1,600 were attached in the possession of the Fitchburg Railroad Co., summoned as trustee therein; that his claim against said defendant is for a much larger sum; that he has reason to believe that funds of the defendant to a large amount are now in the hands of said Fitchburg Railroad Company.

Wherefore he moves that supplementary process may issue for the attachment of such funds to the amount of $8,500 by trustee process.

By his attorney, GEO. B. IVES.

16 *Special Precept of Attachment & Officer's Return.*

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

To the sheriffs of our several counties or their deputies, Greeting:

Whereas, in a cause now pending in our superior court within and for our said county of Essex, at the September sitting thereof, A. D. 1885, in which the New York, Lake Erie and Western Railroad Company, otherwise called the Erie Railroad Company, a corporation established under the laws of a foreign jurisdiction and having a place of business in this Commonwealth, summoned to answer unto David T. Winter, of Peabody, in the county of Essex, in an action of tort, the writ being dated May first, A. D. 1885, and the case numbered 2834 on the docket of said court for said September sitting, upon the motion of the said David T. Winter, filed in our

said court October 7, A. D. 1885, praying that a special precept, under the provisions of chapter 161, sect. 85, of the Public Statutes, may be issued for the attachment of the goods or estate of the said New York, Lake Erie and Western Railroad Company to secure the judgment or decree which the said David T. Winter may obtain in said cause, it has been ordered by our said court, upon good cause shown, that a special precept of attachment be issued as therein prayed for to secure the judgment or decree which the said David T. Winter may obtain in said cause:

We command you, therefore, to attach the goods or estate of the said New York, Lake Erie and Western Railroad Company, otherwise called the Erie Railroad Company, to the value of eight
17 thousand five hundred dollars to secure the judgment or decree which the said David T. Winter may obtain.

And whereas the said plaintiff says that the said defendants have not in their own hands and possession goods and estate to the value of eight thousand five hundred dollars aforesaid which can be come at to be attached, but have intrusted to and deposited in the hands and possession of the Fitchburg Railroad Company, a corporation established under the laws of this Commonwealth, trustees of said defendants, goods, effects, and credits to the said value:

We command you, therefore, that you summon the said trustees, if they may be found in your precinct, to appear before our justices of our said court, at Salem, in the county of Essex, on the first Monday of November, 1885, to show cause (if any they have) why execution to be issued upon such judgment as the said plaintiff may recover against the said defendants in this action (if any) should not issue against their goods, effects, or credits in the hands and possession of *him*, the said trustees, and have you there this writ with your doings therein.

Witness, Lincoln F. Brigham, Esquire, at Salem, the
[L. S.] twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-five.

DEAN PEABODY, *Clerk.*

BOSTON, *October* 16, 1885.

SUFFOLK, *ss:*

By virtue hereof, I this day, at 25 minutes past 11 o'clock a. m., summoned the within-named The Fitchburg Railroad Company to appear and show cause at court, as within directed, by delivering to Mason D. Benson, Esq., treasurer thereof, in hand an at-
18 tested copy of this precept.

THOMAS FEE, JR.,
Deputy Sheriff.

Fees, $3.10.

Appearance for Def't.

ESSEX, *ss:*

Superior Court, Nov., 1885.

DAVID T. WINTER
v.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. & TRS.

Appearance for defendant.

In the above-named action I appear for the defendant.

S. J. THOMAS,
Att'y for Def't.

Trustee's Answer.

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

Superior Court, November, 1885.

WINTER
v.
N. Y., LAKE ERIE & WESTERN R'Y CO.

Answer of alleged trustee.

And now the Fitchburg Railroad Company, summoned as trustee of the principal defendant in the above-entitled action, appears and makes answer that at the time of the service of the plaintiff's special precept upon it there was due to the prinipal defendant the sum of $2,962.85, including the amount disclosed in the previous answer, and said alleged trustee had not at said time of service any other goods, effects, or credits of said defendant in its hands or possession, and of this it submits to examination upon oath.

19

MASON D. BENSON, *Treasurer.*

SUFFOLK, *ss:*

Nov. 11, 1885.

Then the above-named Mason D. Benson, treasurer as aforesaid, made oath that the foregoing answer subscribed by him is true to the best of his knowledge and belief.

Before me— THOMAS WHITTEMORE,
Justice of the Peace.

Bond.

Know all men by these presents that we, the New York, Lake Erie and Western Railroad Company, a corporation organized under the laws of the State of New York, as principal, and the American Surety Company, a corporation also duly organized under the laws of the same State and duly admitted to do business in the Com-

monwealth of Massachusetts, as surety, are holden and stand firmly bound unto David T. Winter, of Peabody, in the county of Essex and Commonwealth of Massachusetts, in the sum of ten thousand dollars, to the payment of which to the said David T. Winter or his executors, administrators, or assigns we hereby, jointly and severally, bind ourselves, our heirs, executors, and administrators.

The condition of this obligation is such that whereas the said David T. Winter has caused the money and credits of said New York, Lake Erie & Western Railroad Company to the value of ten
20 thousand dollars to be attached by trustee process by virtue of a writ in favor of the said David T. Winter against the said New York, Lake Erie and Western Railway Company, principal defendant, and the Fitchburg Railroad Company *et als.*, alleged trustees, which writ bears date the first day of May, A. D. 1885, and is returnable to the superior court for the county of Essex, in said Commonwealth, on the first Monday of June, A. D. 1885, and also by supplementary process of attachment in the same action, dated October 12, 1885; and whereas the said New York, Lake Erie and Western Railroad Company desire to dissolve said attachment according to law:

Now, therefore, if the said defendant corporation shall, within thirty days after the final judgment in the aforesaid action, or after any special judgment therein entered in accordance with section one of the sixty-eighth chapter of the statutes of said Commonwealth passed in the year 1875, pay to said plaintiff the sum, if any, for which the said trustee shall be charged, not exceeding the value of the property in said trustee's hands, or so much thereof as will satisfy the amount recovered by the said plaintiff, then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

In witness whereof the said New York, Lake Erie & Western Railroad Company has caused these presents to be signed and its corporate seal to be thereon affixed by A. R. Macdonough, secretary, thereto duly authorized, and also the said American Surety Company has caused these presents to be signed and its corporate seal to be thereto affixed by its second vice-president and assistant
21 secretary, thereto duly authorized, November 10th, 1885.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
By JOHN KING, *President.*
AMERICAN SURETY COMPANY,
By HENRY D. LYMAN, 2d *Vice-President.*

Signed and sealed in the presence of—
GEO. E. GRANT,
[L. S.] *Notary Public, N. Y. City & Co.*

Attest: [L. S.] A. R. MACDONOUGH, *Secretary.*

Attest: DAVID B. SICKLES,
[L. S.] *Ass't Secretary.*

SALEM, *Nov.* 13, 1885.

Bond approved.

GEO. B. IVES,
Plaintiff's Att'y.

ESSEX, *ss:*

Superior Court, Nov., 1885.

WINTER
v.
N. Y., L. E. & W. R. R & TR'S.

Answer.

And now comes the defendant corporation and for answer denies each and every allegation in the plaintiff's declaration.

By its attorney, S. J. THOMAS.

ESSEX, *ss:*

Superior Court, December Sitting, 1885.

DAVID T. WINTER
v.
N. Y., L. E. & W. R. R.

Defendant's Answer.

And the defendant comes and for answer denies each and every allegation, item, and statement in the plaintiff's writ and dec-
22 laration contained, and each and every count thereof.

And, further answering, the defendant says that the plaintiff took its train at Olean, and on the defendant's conductor applying to him for his ticket the plaintiff presented a ticket, which was cancelled, to Salamanca, whereupon the conductor told him that such ticket was not good to Salamanca, and that the rule of the road for all passengers required him not to accept it, although it would be good west of Salamanca, and in conformity with that rule he could not accept it, and that he, the plaintiff, must pay his fare to Salamanca, which the plaintiff refused to do and said the conductor might put him off if he, the conductor, dared to do so. The conductor then told him he should be obliged to stop the train at the next station and put him off, and on arrival at Alleghany station, the plaintiff still refusing to pay his fare, the conductor stopped the train and put the plaintiff off the car, using no more force than was necessary and proper so to do.

And the defendant says the plaintiff had no lawful right to be transported over said road to Salamanca, and was travelling on the defendant's cars in violation of a uniform rule of the road explained to the plaintiff before he was put off, and without any lawful right whatever, and that if the plaintiff sustained any injury to his person, his property, or his feelings, as alleged, it was due solely to his own wrong.

NEW YORK, LAKE ERIE & WESTERN R. R.,
By its att'y, SETH J. THOMAS.

ESSEX, *ss*:

Superior Court, March Sitting, 1886.

DAVID T. WINTER
v.
N. Y., LAKE ERIE & W. R. R. Co.

Motion to Set Aside Verdict.

And now comes the defendant and moves that the verdict in said cause be set aside and a new trial granted, for the reason that said verdict is against the law and the evidence and the weight of evidence.

By H. P. MOULTON,
His Attorney.

26 ESSEX, *ss*:

Superior Court, March T., 1886.

DAVID T. WINTER
v.
N. Y., LAKE ERIE AND WESTERN RAILROAD Co. & TRUSTEES.

Defendant's Motion for New Trial.

And now comes the defendant in the above-entitled action and moves that the verdict returned in said cause be set aside and a new trial granted, because—

1st. The verdict is against the evidence and the weight of the evidence.

2nd. It is against the law as ruled to the jury by the presiding judge.

3rd. It is excessive in amount.

4th. It is founded on sympathy or prejudice.

By its attorney, SETH J. THOMAS.

April 2, 1886.—Verdict set aside.

27 COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss*:

Superior Court.

DAVID T. WINTER
v.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD Co. & TRS.

Petition to Remove Action to the Circuit Court of the United States for the District of Massachusetts.

To the honorable the justices of the superior court within and for said county of Essex:

Respectfully represents The New York, Lake Erie and Western Railroad Company, the defendant in the above-named action, that said suit was brought by a writ dated May 1st, A. D. 1885, returnable to

said court on the first Monday of June, A. D. 1885, at Salem, in said county; that the action was alleged in said writ to be one of tort, and the damages laid at ten thousand dollars; that the amount in dispute in said suit, exclusive of costs, exceeds the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States; that the defendant above named was at the time of the commencement of said suit and still is a corporation duly established and existing at New York, and a citizen of the State of New York, and that the plaintiff hereinbefore named alleges himself to be and was at the time of commencing said action and still is a citizen of the State of Massachusetts.

And your petitioner avers that it has reason to believe and does believe that from prejudice or local influence it will not be able to obtain justice in said State court, to wit, the superior court aforesaid, and files herewith its affidavit to that effect.

28 The defendant also files herewith a bond, with good and sufficient surety, for entering into said circuit court on the first day of its session next to be held after filing this petition all such copies as required by law, and also for paying all costs which may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto.

And said defendant prays that said suit above named may be removed forthwith into said circuit court of the United States for said district of Massachusetts, and that this honorable court shall proceed no further in said suit, except to make the proper order of removal.

NEW YORK, LAKE ERIE &
WESTERN RAILROAD CO.,
By its president, JOHN KING, *Pres't.*

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

Superior Court.

DAVID T. WINTER
v.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. & TRS.

Defendant's Affidavit.

I, John King, on oath depose and say that I am the duly elected and authorized president and chief executive officer of The New York, Lake Erie and Western Railroad Company, the defendant in the action brought by David T. Winter *v.* said company, by writ dated May 1st, 1885, and now pending in the superior court within and for the county of Essex, in the Commonwealth of Massa-

29 chusetts; and I, Augustus R. Macdonough, on oath depose and say that I am the duly appointed and authorized secretary of said railroad company, and also one of its executive officers; and we, the said King and Macdonough, further depose and say

that said suit above named is between said Winter, who is a citizen of the State in which it is brought, to wit, Massachusetts, and the defendant railroad company, which is a citizen of another State, viz., the State of New York, and that the said defendant believes and has reason to believe that from prejudice or local influence the defendant will not be able to obtain justice in said State court.

JOHN KING.
AUGUSTUS R. MACDONOUGH.

Sworn to before me this seventh day of June, 1886.
[SEAL.] GEO. B. GRANT,
Notary Public, N. Y. City & Co.

Defendant's Bond for Removal.

Know all men by these presents that the New York, Lake Erie and Western Railroad Company, a corporation established under the laws of the State of New York and existing in said State, as principal, and the American Surety Company, a corporation duly established under the laws of said State and existing at the city of New York, therein, but authorized to execute judicial and other bonds in the Commonwealth of Massachusetts, as surety, are holden and stand firmly bound unto David T. Winter, of Peabody, in the county of Essex and Commonwealth aforesaid, in the penal
30 sum of five hundred dollars; to the payment whereof, well and truly to be made unto the said David T. Winter or his heirs, executors, or administrators, the said corporations bind themselves, jointly and severally, by these presents. The condition of this obligation is such that whereas the said New York, Lake Erie and Western Railroad Company has petitioned the superior court, sitting within and for the said county of Essex, for the removal into the circuit court of the United States for the district of Massachusetts of a certain cause pending in said superior court, wherein said David T. Winter, who is a citizen of said Commonwealth of Massachusetts, is plaintiff, and the said New York, Lake Erie and Western Railroad Company, which corporation is a citizen of said State of New York, is defendant, and the Fitchburg Railroad Company was summoned, with other corporations, as trustee, the writ in said cause bearing date the first day of May, A. D. 1885, and being made returnable to said superior court on the first Monday of June, A. D. 1885:

Now, if the New York, Lake Erie and Western Railroad Company, said petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, copies of the record and of all process, pleadings, depositions, testimony, and other proceedings in said cause, and shall pay all costs which may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall be and remain in full force and virtue.

In witness whereof the said New York, Lake Erie and
31 Western Railroad Company has caused these presents to be executed and its corporate seal to be hereto affixed by John King, its president, thereto duly authorized, and the said American Surety Company has caused these presents to be executed by Henry D. Lyman, its vice-president, and its corporate seal to be hereto affixed by David B. Sickels, its assistant secretary, respectively hereto duly authorized, this seventh day of June, A. D. 1886.

[SEAL.] NEW YORK, LAKE ERIE & WESTERN RAILROAD CO.,
By JOHN KING, *Pres't.*

Attest: A. R. MACDONOUGH, *Secretary.*

[SEAL.] AMERICAN SURETY COMPANY,
By HENRY D. LYMAN, *Vice-President.*
DAVID B. SICKELS, *Ass't Secretary.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this seventh day of June, in the year 1886, before me personally came Augustus R. Macdonough, secretary of the New York, Lake Erie & Western Railroad Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he was the secretary of the New York, Lake Erie & Western Railroad Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of said company, and that he signed his name thereto by the like order as secretary of the said company.

And the said Macdonough further said that he was ac-
32 quainted with John King and knew him to be the president of said company; that the signature of the said John King subscribed to the said instrument was in the genuine handwriting of the said John King and was thereto subscribed by the like order of the board of directors and in the presence of him, the said Macdonough.

GEO. E. GRANT,
[SEAL.] *Notary Public, N. Y. City & Co.*

CITY AND COUNTY OF NEW YORK:

On this 7th day of June, 1886, before me personally appeared Henry D. Lyman, vice-president of the American Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as president of said company by like authority, and that the liabilities of said company do not exceed its assets as

ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881; and the said Richard A. Elmer further said that he is acquainted with David B. Sickels and knew him to be the ass't secretary of said company; that the signature of the said David B. Sickels subscribed to the said instrument is in the genuine handwriting of the said David B. Sickels, and was thereto subscribed by the like order of the said board of directors and in the pres-
33 ence of him, the said Henry D. Lyman.

[SEAL.] C. W. HERMAN,
Notary Public, Kings County, New York.

Certificate filed in New York county.

COMMONWEALTH OF MASSACHUSETTS, *Essex,* } *ss:*

Superior Court, June 10, 1886.

And now, upon the foregoing petition, the same having been duly considered, it is ordered that the said suit be, and the same is hereby, removed from this court into the circuit court of the United States for the district of Massachusetts next to be holden at Boston, in said Commonwealth.

By the court.

DEAN PEABODY, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS, *Essex,* } *ss:*

I, Dean Peabody, clerk of the superior court for said county of Essex, do certify that the foregoing are true copies of the writ and all other papers on file and of the proceedings and of the record in the action of David T. Winter *vs.* New York, Lake Erie and Western Railroad Co. and trustees, entered at the June term of said court, 1885, and by the order of said court removed to the circuit court of the United States.

In witness whereof I hereunto set my hand and affix the seal of said superior court this twentieth day of July, in the
[L. S.] year of our Lord one thousand eight hundred and eighty-six.

DEAN PEABODY, *Clerk.*

34 This cause, entered as aforesaid at the said October term of this court, A. D. 1886, was thence continued to the May term, A. D. 1887, when, issue having been joined, the Honorable Thomas L. Nelson, district judge, sitting and holding the court, a jury was empanelled and sworn according to law to try the issue, who, after hearing all matters and things concerning the same, returned their verdict and on oath said, to wit, June 9, 1887, "The jury find for the plaintiff and assess damages in the sum of ten thousand dollars."

On the sixteenth day of June the following motion was filed:

Motion for New Trial. (*Filed June* 16, 1887.)

And now comes the defendant and moves that the verdict in said case be set aside and a new trial granted, and *as* assigned as causes of said motion—

First. The verdict is against the evidence and the weight of the evidence.

Second. The damages are excessive.

By their attorney, SETH J. THOMAS.

Which motion was, on the third day of September, A. D. 1885, denied by the court, the Honorable Thomas L. Nelson, district judge, sitting.

On the tenth day of October the following motion was filed:

35 *Motion to Increase ad Damnum.* (*Filed Oct.* 10, 1887.)

The plaintiff comes and moves to amend his writ in this action by increasing the *ad damnum* thereof and the damages claimed therein from ten thousand dollars to fifteen thousand dollars.

By his attorney, L. S. DABNEY.

This cause was thence continued to this present October term, when the foregoing motion is heard and allowed by the court, and the *ad damnum* in the writ is increased accordingly to fifteen thousand dollars, the Honorable Thomas L. Nelson, district judge, sitting.

It is thereupon considered by the court, to wit, February 11, 1888, the Honorable Thomas L. Nelson, district judge, sitting, that the said David T. Winter, plaintiff, recover of the said New York, Lake Erie and Western Railroad Company, defendant, the sum of ten thousand four hundred and three dollars and thirty-three cents, damages, and his costs of suit, taxed at —.

On the eleventh day of February, A. D. 1888, the following bill of exceptions is filed and allowed:

Defendant's Exceptions. (*Filed Feb.* 11, 1888.)

This is an action of tort to recover damages for having been put off the defendant's car while a passenger thereon between Binghampton and Salamanca, in the State of New York. The pleadings are made a part of this bill. At the trial, before Nelson, J., and a jury, the plaintiff testified as follows:

36 My name is David Thomas Winter; I live in Peabody, Massachusetts, and have lived there since 1876; my occupation is machinist and inventor; am thirty-eight years of age; my business has compelled me to travel about a great deal. I paid during the year 1881 about $1,000 for car fare; travelled in this country by railroad and steamboat lines; had occasion in the early part of 1882 to go West, to Milwaukee, to set up machinery there, and to Detroit. Before I started to Milwaukee I had occasion to go to

New York State—to Portville, Cataraugus county. The way to get there was by Binghamton, New York, and Olean, then by way of a cross-section road to Portville, which intersected the mail line at Olean. Portville is about six miles south from Olean. My first business was in Portville. I had been to Portville before then, but not by that route. I came from Peabody to Boston and went to the Fitchburg station to buy my ticket. I found the ticket agent in the office.

Q. Did you tell him anything?

(Objected to by Mr. Moulton.)

Q. Did I ask you the date?

A. February 13th, 1882.

Q. Now, I will put the question.

Mr. MOULTON: I desire to object.

By the COURT: What is the objection?

Mr. THOMAS: I suppose what the agent said and what he said to the agent is not competent here.

The COURT: I admit it. Do you except?

Mr. THOMAS: Yes, your honor.

(Exception saved.)

Q. What did you say to the ticket-seller?

37 A. I told the agent I wanted to go to Milwaukee and wanted to buy a ticket for that place which would enable me to stop off at a place called Olean, in New York State. He said he was not able to tell me just then what the ticket would cost, as a change was made in the rate that day; would I come inside the station. I was then on the platform in the depot. He was in the ticket office. There is one window that opens on the platform and another into the waiting-room in the station. I went into the waiting-room. He took some time to look it up, and then told me what the ticket would cost. It was somewhere about $26.

Q. Now, did he tell you anything about the price of that ticket as compared with the price of the other ticket?

A. Yes, sir; if I didn't have to stop over at Olean my ticket would cost $3 less; but the fact of buying an unlimited ticket which would give me the right to stop over would cost $3 more, and that was the amount named—$3.

Q. Anything else said?

A. I asked him to give me a ticket of that description—an unlimited ticket. He took the ticket, prepared it for me, stamped it, or whatever he did, and handed me the ticket, and I handed him the money.

Q. Was anything said about stamping the ticket?

A. I said, "Conductor, this ticket is all right. It is printed 'limited ticket;'" and he said, "Yes; it is all right. It will allow you to stop over by speaking to the conductor." It had underneath: "This ticket is limited to any place punched out on the margin." If there is no date punched out it is an unlimited ticket, as he stated.

38 Q. If no date is punched out on the margin, then it is an unlimited ticket?

A. Yes, sir.

Q. And the ticket, as you received it, had no date punched out on the margin?

A. No, sir.

Q. And he told you that gave you a right to stop off by speaking to the conductor?

(Objected to by Mr. Thomas as leading.)

A. Yes, sir.

Q. Describe generally that ticket.

A. The ticket was composed of coupons. There was one general ticket, and the rest were coupons as far as Chicago. The Milwaukee was a separate ticket—from Chicago to Milwaukee.

By the COURT:

Q. They were detached?

A. Yes, sir; there were two separate tickets, one through to Chicago and then another. There was a transfer ticket across the city of Chicago. Whether that was attached to the Milwaukee ticket I don't know. I bought, really, two tickets. It was a ticket he could not sell in one piece, so I had two pieces of paper.

Q. Do you remember how many coupons there were in the ticket from Boston to Chicago?

A. I could not say, exactly, without counting them up; four or five. The first coupon read over the Fitchburg road; the next, I think, was over the Hoosac Tunnel and Western road; the next, I know, was over the Susquehanna, to Binghamton; the next from Binghamton to Salamanca, over the New York, Lake Erie
39 and Western R. R., and the next one from Salamanca, over the New York, Pennsylvania & Ohio R. R., and then on the the Pittsburg, Fort Wayne & Chicago, I believe.

Q. What became of the coupon from Binghamton to Salamanca?

A. The conductor took it; have never seen it since.

Mr. DARNEY to Mr. Thomas: Have you that coupon? We call upon you to produce it.

Mr. THOMAS: We have not.

Q. Describe what was on that coupon.

A. I think it stated on it that it was issued by the Fitchburg R. R. Co. on account of the New York, Lake Erie & Western R. R.; then "from Binghamton to Salamanca," and underneath that "Not good if detached." I think that was all beside the number of the ticket; it might have been stamped on the back. I could not remember whether it was or not.

Q. Do you remember anything else about the ticket—either the coupon or the body of the ticket?

A. The coupon was punched.

Q. I mean when you received it. Was it punched when you received it?

WITNESS: In Boston?

Mr. DABNEY: Yes.

A. No, sir.

Q. Can you give any other description of the coupon from Binghamton to Salamanca when you received it or of the body of the ticket?

A. No, sir.

Q. Have you stated all the conversation you remember
40 between yourself and the ticket agent?

A. No, sir; we had other immaterial conversation in the depot.

Q. Did you have any further conversation in regard to where you wanted to go, how you wanted to go, or what ticket you desired?

A. Not that I know of, sir. I started from Boston on that day, February 13th, on the three-o'clock express.

Q. You said the ticket-seller told you there had been some change in the rates. Do you remember anything about this ticket being sold under new rates beyond that?

A. He said there had been a low rate into effect up to the 11th. If I had taken the ticket on Saturday I could have gone to Chicago for $5; they pooled their issues and had made a new rate. He said he should have to look up the new rate. I suppose mine was the first sold on the new rate.

Q. When did you get to Binghamton—you went there without stopping?

A. Yes, sir; between three and four o'clock the next morning, I think; not sure.

Q. After leaving Binghamton what did you first say to the conductor? State what you saw of him and any conversation you had with him.

A. I don't remember any until we got to Hornellsville.

Q. Had you seen him before you got to Hornellsville?

A. I think so.

Q. Had you with you the same ticket you described—that you described you bought in the Fitchburg station in Boston?

41 A. Yes; same ticket, minus what had been torn off by the other conductors.

Q. Had you any other ticket with you?

A. I had the Milwaukee ticket, which was part of this one. When we left Hornellsville the conductor came through the car.

Q. When did he first speak to you?

A. When he came into the car, after we had left Hornellsville. Leaving Hornellsville he came for the tickets, and then I recognized him, of course, as the conductor of the train.

Q. Did you have any conversation with him then?

A. Yes; he took my ticket in his hand.

Q. That was the same ticket you bought in Boston?

A. Yes, sir; exactly.

Q. Tell us all that passed between you.

A. He took my ticket in his hand, and while he had it punching it I said, "Conductor, I want to stop off at Olean;" and I said, "Will we catch the train which left Buffalo this morning at eight o'clock, and which ought to intersect this one; will we get it so I can get to a place called Portville this morning? As we are late, I thought I would ask you the question." He said, "Yes, we will; that train gets Southern passengers from this train and waits for us if we are late." I said, "I want to get off there;" and he said, "I will fix you all right;" the ticket then in his hand. He gave me the ticket with the coupon on it punched.

Q. Was anything further said at that time?

A. I don't think there was.

42 Q. Did you have any further conversation with him before arriving at Olean?

A. Yes, sir; once or twice he came and looked at the ticket, or two or three times after that, and I asked him if he was sure we would make that connection, as we were so late, and he said, "I told you before we would make the connection all right, as it waits for us and takes Southern passengers from us."

Q. Is that substantially all that passed between you before you got to Olean?

A. Yes, sir.

Q. Do you remember how many times your ticket had been punched before you got to Olean?

A. I could not remember—a number of times.

Q. When you got to Olean what occurred?

A. I got off the train.

Q. Was the other train there?

A. No, sir; it didn't stop, nor hadn't, nor didn't pretend to stop.

Q. Had it gone?

A. Yes, sir; there was a construction train—I think a stone train, with a caboose—and I got into the caboose and paid my fare in it, and I got to Portville that way; that was the 14th on Tuesday. I came back from Portville the same day; got to Olean during the evening; don't remember exactly what time.

Q. Had anybody told you what time the train West arrived at Olean?

43 A. Yes, sir; the conductor. I asked him that question along with the rest—what time the next express went West. I asked him some time on the trip—I couldn't say which time—some time between Olean and Binghamton, and he told me it left Olean some time between eleven and twelve at midnight; I think it was twenty-five minutes of twelve at midnight. It was very cold, indeed. I don't think there was snow on the ground. The train arrived at Olean after I got back there. It was a little late, I think. I got into one of its cars that same Tuesday night; I don't think it was quite Wednesday morning. That was the train bound west from Olean.

Q. After you got into the car what occurred?

A. I sat down and removed my overshoes and put my valise away. I had two. I had a small hand bag, a clothes valise, a tool

valise, and some pieces of machinery tied with rope in a heavy brown paper. That was all the baggage I had. I had no trunk in the baggage car. I had these things in the seat with me.

Q. What became of the clothes valise?

A. I have never seen it since.

Q. What was the value of it?

(Question objected to by Mr. Thomas.)

(The COURT):

Q. Is that set out in your count?

Mr. DABNEY: Yes, your honor; it is a part of the declaration.

Reads count and declaration.

The COURT: It is admitted.

(Exception taken by Mr. Thomas.)

Q. What was the value of it?

A. As since determined, it might not have exceeded ten or
44 fifteen dollars—as since found out—that is, the clothes bag and the clothing and papers that were in it.

Q. Well, now to resume. You got into the train with this baggage. Now, what happened after that?

A. The conductor came along; I don't know as he asked for my ticket. I saw him there and handed him this ticket that I bought in Boston minus the coupons. He looked at it a minute and threw it back to me on the seat with the remark that it was no good. I asked him why. He said he wasn't there to tell me why; he was there to take the fares. I said, "I bought that ticket for a good ticket, and I think if you will look at it you will find you are mistaken." He said, "I have no time to argue with you; I want so many cents if you are going through to Salamanca." I said, "Why, conductor?" He said, "I told you I have no time to argue with you; I am not here for that purpose." I talked some little, but I got no satisfaction; and I asked him if he would give me a receipt if I paid him to Salamanca—give me something to show that I had paid my fare again. He said he wouldn't; he wasn't called upon to do any such thing; that I must pay my fare; if I didn't he wouldn't take me to Salamanca. We talked some little, and then he said I must pay him at once or he would stop the car and put me off. I told him if he would give me no receipt whatever I wouldn't pay him, considering that I had already got a ticket for that place which I had paid for.

Q. That is what you said to him?

A. Yes, sir. He then stopped the train, put his hand on
45 my shoulder, and said, "Come, get off!" Said I, "No, sir; I shall not get off, and you can't put me off, and I want you to take your hand off my shoulder." He took his hand off my shoulder and went down through the car. Just as he left me the train started up again, and he put his hand on the bell-rope and brought it down a second time. I don't know how long it was before he brought it

down a second time. I couldn't state the time, but quite a little ways. He came in then with help and told his help to put me off that train. I couldn't tell what his help were—employees, brakeman; two or three—that is, there were more than one. Then he pulled me through the aisle of the cars to the platform. I don't think the conductor took part in that. They got me to the platform and we turned the corner of the platform toward the track—toward the open air from the train. I saw then that it was pitch dark; that there wasn't a star, moon, or anything visible. I couldn't see anything, any object at all, ground or otherwise. I then objected to being put off—that is, positively objected—and I hung on.

(By Mr. MOULTON:) What you said, sir. Give the talk.

(By Mr. DABNEY:) He has got through giving the talk. He is now telling what was done.

WITNESS: I had got through the talk. I took hold of the rails of the car, one on one side and one on the other—the hand-rail of the car. The hand-rail on the platform was in the right hand and the hand-rail on the car was in the left. I positively objected to being put off.

46 Q. What did you say?

A. I said I wouldn't be put off if I could help myself, in such a place. The conductor — standing on the platform behind them, and I said, "Conductor, I will pay my fare before I will be put off in a place like this."

Q. What was the place?

A. I afterwards found out it was a place some distance above the little station of Alleghany.

Q. At the place there was there a station?

A. No. He said, "You wouldn't pay me in the car and I will put you off now if I go through hell for it." That was his statement.

Q. What were they doing to you in the meantime?

A. Pushing me, hammering my left hand, trying to get that off, and finally did get it off. One man got it off by putting his foot against it and pushing it off. By that time there was a man had come round, so as to make it light.

Q. His foot against your hand?

A. Yes; his foot against my wrist. That is the way I was put off.

Q. By that time, you say, a man had come round with a light?

A. Yes, sir; he had a lantern. At any rate, I could see to get down at that time. As I slipped my hand gave way from the side rail, and the conductor said, "Don't let him fall," to the man who was standing down quite a distance below. The man caught that hand—the left hand—as it slipped down from the rail. One

47 or two fingers and that whole wrist was turned clear back. My whole weight came on the wrist down at that joint (indicating). Then was when I felt a great deal of pain. I told him right then that he had broken my hand or finger, one or the other. I think my finger felt it first. This was after I got on the ground

that I told him so. There was no platform there. Where I landed it was gravel.

Q. And what became of your baggage and tools?

A. It lay down on the ground.

Q. What was it?

A. It was my bundle of tools, my black valise of tools and these parts of machinery.

Q. How did you find them?

A. By the aid of that lantern.

Q. Was there anything else passed at the time?

A. I asked him if they were going to leave me there without a light or house in sight, and he said if I would walk down ahead of him he would light me to a station. I walked ahead; he was behind me. We walked down, or I walked down, till I saw by the movement of my shadow that he was swinging his lantern for some purpose or other to the rear end of the train, and I saw him get on the rear end of the platform.

He made some remark to me when he got on, and left me standing there in the darkness.

The plaintiff further testified that he walked some distance before he got to the station platform; that the station was closed and there were no lights there; that he found there and
48 talked with a person who had got off the same train; that it must have been about midnight when he was put off, and that the weather was very cold; that he found he did not have his clothes valise, and had not seen it to this day; that he subsequently spent the night at Alleghany, and on the following morning hired a carriage and went to Olean; that he there took a western-bound train on the defendant railroad that came along at the same hour as the train he had left there on the day before to go to Portville; that upon this train, when the conductor came along, the plaintiff presented the same ticket exactly which he had presented to the conductor who had ejected him the night before; that the conductor took it, tore off the coupon Binghamton to Salamanca and passed the rest of the ticket back; that he rode to Salamanca, paid no fare, gave no ticket, and was asked for none other than the coupon which had been refused the night before; that after reaching Salamanca he continued his journey.

Plaintiff also testified as to the nature and extent of the injury resulting from his ejection from the defendant's train as aforesaid; that while he was at Alleghany his wrist was much swollen and very painful; that it continued so upon his journey; that he could not use both hands in setting up machinery at Milwaukee and Detroit; that he treated it upon his journey and upon his return put himself under medical treatment and has had such ever since; that from his return to the present day his left hand has been useless; that previous to this injury his left hand and wrist were perfectly well; that he had constant pain in his wrist and hand since, and great suffering at times; that the result of the injury was that
49 the wrist became diseased with a painful and dangerous disease called by the doctors caries; that amputation was advise

by the surgeons as the only cure for this disease; that in consequence of the injury and disease he had been unable to travel and attend to his business, so that it had taken away all his business; that he was not aware of any injury to his wrist before or since 1882, except what resulted from being put off the defendant's train.

On cross-examination the plaintiff was shown the ticket annexed below, and testified that except the number and the punch-marks and the writing and lines in red ink (sample) it was like the ticket he bought.

(Here follows diagram marked p. 49*a*.)

On cross-examination the plaintiff also gave the following testimony as to what passed between himself and the defendant's conductor between Hornellsville and Olean before the plaintiff left the train at Olean to go to Portville:

Q. Now, won't you tell his honor what conversation you had with that conductor that came in after you left Hornellsville.

A. I gave him my ticket, and whilst he had the ticket I told him I wanted to stop over at Olean, and I asked if his train connected with the train that left Buffalo at eight o'clock that morning, so that I could get down to Portville. He said yes, it did; I would get down all right, as that train got the southern passengers from his
50 road.

Q. Is that all he said?

A. I talked and said I wanted to stop over to Olean, and he said I will fix you all right.

Q. Did you ask him for a stop-over check?

A. No, sir.

Q. Did he say anything about a stop-over check?

A. No, sir.

On being recalled by his counsel he testified that when he bought his ticket, as he had testified, at the Fitchburg station, in Boston the man who sold it to him said nothing to him about a stop-over check, and that in his conversation with the conductor before he got to Olean nothing was said about a stop-over check.

All the testimony of the plaintiff in regard to the damage he sustained and his conversation with the ticket agent was given against the objection of the defendant and with the reservation that his exceptions were to be served at the proper time.

The plaintiff also called one COOLIDGE C. DAGGERT, who testified that he was the ticket agent at the Fitchburg depot, in Boston, and had been such agent for thirty-three years; that he had sold tickets over the New York, Lake Erie and Western road as part of a ticket to go to points in the West about ten or twelve years, and that those tickets were honored during that time. As to his authority to sell them he testified as follows:

51 Q. Did you have any authority from that company to sell them?

A. No, sir; all the authority I have is from our general ticket agent.

Q. Does he have authority to sell those tickets?

A. I presume so. I couldn't say. As he gives them to us to sell, I presume he is authorized to do it.

The witness further testified that he had been selling such tickets openly for ten or twelve years; had sold a good many of them, and that he had never heard that persons who bought them didn't get their rights according to such tickets.

He also testified that such tickets could not be used unless they bore his office stamp.

As to a change in rates about Feb. 13, 1882, I couldn't remember. There were frequent changes of rates; have no recollection of selling Mr. Winter this ticket. I have a book which shows the sale of that ticket; that is all. I can't give the exact date. I see we sold a ticket to Chicago, form A 300; first class; No. 298; price paid, $25.15; unlimited. We punch a limited ticket, cancel the dates on the margin of the contract, and put an L punch on each of the coupons of a ticket that is limited.

The plaintiff's counsel shows him the ticket hereto annexed, and the witness says it is the same form and it is unlimited. To make it limited we would cancel out the year, month, and date and put an L punch in each of the coupons. This ticket was sent as a sample. The punch-marks were put in it so that no one could use it.

52 These marks do not indicate how the conductor of the train would mark it. If limited, I think the rate would have been two or three dollars less. I did not sell the ticket that day; think an assistant, Mr. Kimball, sold it when I was out. I don't think I am the man that Mr. Winter saw. I never remembered of the case. I could not say that I did not, but I have no recollection of it. I think it was done when I was out at noon, but I am not positive about it. A limited ticket gives no right to stop over. An unlimited ticket gave him the privilege to stop over by getting a check of the conductor subject to the rules and regulations of the road over which he passed. Being asked by plaintiff's counsel, "Didn't an unlimited ticket give him a right to stop over by speaking to the conductor?" the witness answered, "Yes, sir; and getting a stop-over check. We should tell him he must get a stop-over check from the conductor."

Q. You would tell him he had got to speak to the conductor if he had to stop over?

A. Yes, sir.

Q. Expecting the conductor would do whatever was necessary?

A. Yes, sir.

On cross-examination witness was asked:

"What was necessary according to the rules and regulations—to get a stop-over check?"

A. Yes, sir.

Q. Did you ever tell anybody they could stop over unless they

conformed to the regulations of the road over which they had to travel?

A. No, sir; we tell them they must conform to the rules and regulations of the road over which they pass.

53 Q. You understand the regulations of these other roads to be that a passenger in order to stop over must speak to the conductor and get a lay-over check in order to lay over?

A. Yes, sir.

Q. That is the rule as you understand it?

A. Yes, sir; that is the rule.

Q. You have no recollection of telling anybody that an unlimited ticket would authorize them to stop over unless they complied with the rules and regulations of the road over which they were to pass and get a stop-over check?

A. No, sir; I always told them that; never tell them anything to the contrary of that. Every ticket of that form A 300 would be a fac-simile of that one; the only difference would be in the number.

(By the COURT):

Q. You do not punch an unlimited ticket?

A. An unlimited ticket we do not punch at all.

Q. In an unlimited ticket, in respect of time or in any other respect, nevertheless, if they want to lay over they must conform to the rules and regulations of the road to get a stop-over check?

A. Yes, sir.

Q. And that is just the same whether it is limited or unlimited?

A. Yes, sir. On a limited ticket the conductor could not let him stop over, anyway. He could not give him that privilege; that is for a continuous passage to his destination; but on an un-

54 limited ticket a man can stop over provided he conforms to the regulations of the road over which he passes; that is essential.

Q. So you would say that a man who was passing over the road on an unlimited ticket, when he resumes the train he could not pass if he had not a stop-over check?

A. No, sir; he could not. He could get on at some station, but he would have to have a stop-over check from the conductor to stop over at a station.

Q. I suppose nothing is paid for a stop-over check?

A. No, sir. The conductor takes it out and marks it.

On redirect examination the witness said: We sold over all the roads, Erie, Lake Shore, Grand Central—there are five or six roads to Chicago.

Being asked by the plaintiff's counsel whether the rules and regulations of all the roads at that time were identical in regard to stopping over, the witness answered: Very nearly the same; all passengers must have a stop-over check.

Q. Whether or not in 1882 you knew what the regulations of the Erie road were about stopping over.

A. No; I did not.
Q. When did you learn that.
A. Ever since I have sold coupon tickets.
Q. Don't you think you would have said to a man if he wanted to buy a ticket and wished to stop over that he must speak to the conductor?
55 A. Yes, sir.

(By Mr. THOMAS:)

Q. Do you mean to change what you said before in regard to getting a stop-over check?
A. I should tell him he must get a stop-over check.

Plaintiff called his wife, who testified as to his suffering and the condition of his wrist; also his brother, C. G. Winter, who testified as to his business and previous condition of health; also four physicians, who testified that he had had caries of the wrist since 1882, and as to his treatment that amputation had been advised, and that a wrench or blow upon the fingers, hand, or wrist, such as the plaintiff had described, was an adequate cause of the diseased condition of his wrist, although it might be produced by other causes; and thereupon the plaintiff rested his case.

The defendant put in evidence the statutes of New York, which provided that R. R. corporations, among others, organized under the law of New York may make all needful and reasonable regulations relative to the conveyance of passengers and the general management of their business, and also that if any passenger shall refuse to pay his fare it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling-house as the conductor shall elect on stopping the train.

The defendant also called WILLIAM M. ABBOTT, of New York city, who testified that he had been connected with the defendant road for some twenty years; first as clerk in the general pas-
56 senger agent's office; for the last fifteen years acting assistant general passenger agent, having left the employ of the road May 1 of the present year, and being now the general Eastern passenger agent of the Montreal, Ontario & Eastern railroad. I am thoroughly conversant with the rules and regulations of the defendant road in 1882 and before that time. The rule in respect to passengers stopping over was printed. Previous to 1872 there were no printed regulations. From 1872 there were printed regulations. There was one series that was put into effect in 1872, and the regulations that are now in effect in regard to stop-over checks were put in effect in 1872, and still remain in force.

The witness also produced a printed notice, signed John N. Abbott, general passenger agent, by order of the president, dated New York, Dec. 8, 1874, in regard to stop-over checks, which was posted in different stations of the company, which contained the following:
(See page 68.)

(By the COURT:) And those now in force have been in effect since 1874?

A. Yes; since 1874. They were printed at that time.

The witness here produced the printed regulations, which were put in evidence, and a copy of which here follows:

No. 151.

Erie Railway Company, office general passenger agent.

NEW YORK, *December 8th*, 1874.

To conductors:

On December 14th inst. the present system of lay-over tickets will be superseded by a new system of "stop-over
57 checks," and you will be governed by the following rules in issuing stop-over checks, to wit:

They may be issued upon local or coupon tickets, but not upon emigrant tickets, commutation tickets, excursion tickets (tourist or "pleasure excursion" tickets excepted), nor upon any tickets upon which the words "continuous passage" are printed, and every stop-over check issued to the passenger must bear the signature, in ink, of the conductor by whom it is issued. You will sign a sufficient number of stop-over checks to meet all reasonable demands daily before starting on your run.

The stop-over check will be issued in exchange for the ticket presented by the passenger, which ticket must be taken up and pinned to the conductor's half of stop-over check and forwarded with daily ticket collections to the auditor.

Before separating the stop-over check you will punch it as follows:

1st. The year. (To save time on the train this may be punched in advance.)

2d. The month.

3d. The day of the month.

4th. The direction, east or west.

5th. The first place of stop-over, as requested by the passenger. (This should be punched twice, and let the punch-marks be about one-quarter of an inch apart on the name.)

The stop-over privilege will be granted for such stations only as are named on the check. If the station at which the pas-
58 & 59 senger desires to stop over is not named on the check, you will punch the station named on the check that is nearest to (beyond) the desired stopping place.

6th. Punch the destination, which must correspond with that of the original ticket.

(To be punched twice, and let the punch-marks be about one-quarter of an inch apart on the name.)

If the destination of the ticket is a station that is not named on the stop-over check, you will punch the station named on the check that is nearest to (but not beyond) the destination of the ticket; then write in pencil on the face of the check, in the space designated, the actual destination of the original ticket.

7th. When not necessary to insert a destination in the blank space you will punch on the blank line opposite the final word "to."

8th. For "half" tickets punch in the space designated.

In adopting this new system of stop-over checks we abolish the present "five-day limitation" and the "redemption feature;" also the restriction to "only one privilege of stop-over."

Make it an invariable rule, when delivering a stop-over check, to call the attention of the passenger to the company's regulations printed thereon.

The new stop-over check is not transferable; and you are directed to refuse any such check that you know is presented for passage by any other person than the one to whom it was originally issued.

The new stop-over check will be good if used within thirty days
from date of issue, and after that time will be void and not
60 accepted for passage; and during thirty days it will convey
to the passenger to whom issued the privilege of stop-over not only at the one station for which issued, but also successively at any or all stations named on the check between that and the destination. In order to accomplish this it will be necessary to adopt a new system of punching stop-over checks. Accordingly, when a stop-over check is presented for passage, you will immediately after leaving each intermediate station named on the check punch the next named intermediate station. After reaching any intermediate station named on the check the passenger will thus be enabled to stop over, if he chooses, and when he resumes his journey his check will be good onward from the station last punched, and in like manner until the check has been used up, if within thirty days. The conductor honoring the check from the last intermediate station to destination will take up and return it to the auditor with his daily ticket collections.

NOTE.—The initial and destination points are to be punched twice, as above directed, but the intermediate stations only once.

Stop-over checks held by passengers occupying sleeping-coach berths must be punched before passengers retire, and all stations must be cancelled up to the point where the conductor will pass through the train in the morning to examine tickets. If, however, upon inquiry the conductor ascertains that a passenger desires to leave the train during the night he will punch the check up to the point of leaving and notify the sleeping-coach conductor "where that passenger is to get off."

61 It may sometimes be necessary to issue a stop-over check even when the passenger does not request it, but for the purpose of enabling him to complete his journey without embarassment from the operation of the stated rules of the company respecting the cancellation of tickets. For instance, a passenger holding a local ticket from Buffalo to Suffern might be obliged to leave the express train at Turners and take a local train thence to Suffern. His local ticket would, under the rule, have been cancelled for the whole distance on the Eastern Division by the conductor of the ex-

press train after leaving Port Jervis, and consequently could not consistently be recognized by the conductor of the local train—Turners to Suffern; but, in order to enable the passenger to complete the trip without paying an extra fare, it would be desirable and proper for the conductor of the express train to take up his ticket and issue him a stop-over check, which would be good from Turners to Suffern.

Such cases will occasionally present themselves to conductors and call for an exercise of your good judgment.

Trip passes may be endorsed for stop-over as heretofore.

Upon December 14th inst. you will please return to this office, per U. S. express, any of the present form of lay-over tickets you may have on hand.

By order of the president:

JNO. N. ABBOTT,
Gen'l Passenger Agent.

62 The witness also produced and put in evidence a book of instructions for the running of trains, etc., on the defendant railroad, which went into effect Oct. 1, 1873, and have been in force ever since; one of which articles provides:

168½. In all cases when a passenger refuses to pay his fare or deliver a proper passage ticket or to conform to the rules of the company or for any other reason is not entitled to ride as a passenger in the cars of the company the conductor is required to expel such passenger from the car, using only such degree of force as may be necessary for the purpose.

Such expulsion shall be made at a usual stopping place or near a dwelling-house, and if in any case the conductor shall have commenced stopping the train the passenger shall not obtain the right of passage by subsequently offering to pay his fare or by otherwise complying with the regulations of the company.

The witness continued: When a stop-over check is issued it is a duplex ticket in two parts, and it is punched, the two parts together, and one-half is given to the passenger and the ticket for which it is given in exchange is pinned to the other half and returned to the company. I saw this coupon ticket from Binghamton to Salamanca. I examined it personally. The assistant general ticket agent of the Fitchburg road advised our company that there was trouble with the passenger — who- he sold this particular ticket I thereupon sent a memorandum to the auditor of the company requesting him to let me see the coupon when it was returned, which was done.

63 The request and reply were put in evidence and are hereto annexed. I have the original memorandum here.

O. W. C.:

Have you the coupon; if so, who cancelled on Western Division?

J. N. A.

J. N. A.:

Ticket cancelled on Western Division by Conductor Hurty herewith.

Feb'y 24, '82.

O. W. C.

B. T.:

Will you please ascertain from "Hurty" if he has any recollection of the circumstance.

J. N. A.

I examined the ticket to see what the form was, what the conditions were, and how it was punched. I have not got the coupon now. The auditor had to hold that against the Fitchburg road for the value of it, to see that the Fitchburg R. R. accounted for it and paid us, and it was returned to him for that purpose. We only hold those for one year and then it was destroyed. It was more than a year before we ascertained that this suit would be brought, and at that time it was destroyed. Our general rule is to hold them one year and then destroy them. It was simply a coupon from Binghamton to Salamanca, exactly the same as the one produced here except the number. It was 298 instead of 498. It was cancelled on the Erie R. R. three times. Each conductor has a punch which makes a different mark, and the record is kept of those, so we can tell what conductor punches a ticket. I didn't keep a memorandum of what conductor punched this ticket between Binghampton and Elmira. It was punched once between Elmira and Hornellsville by Conductor Herty, which cancelled it to that point, and then it was cancelled at another portion of the ticket by Conductor Herty, which cancelled it from Hornellsville to Salamanca. Olean is a station intermediate between Binghamton and Salamanca.

On cross-examination the witness gave the following testimony:

Q. Mr. Abbott, your headquarters when you were in the employ of this company were in New York?

64 A. Yes, sir.

Q. The New York, Lake Erie & Western R. R. Co.?

A. Yes, sir.

Q. And tickets were sold over your road, as I understand it, by the agent at the Fitchburg R. R. Co.?

A. Yes, sir.

Q. And that was done with your knowledge?

A. They were authorized to act as agents for the New York, Lake Erie & Western Railroad Company in the issue of tickets. These regulations have not been changed since 1874. They were put up in every car, printed a circular form, and the conductors were furnished w th them.

The plaintiff put in evidence the letter from the passenger agent of the Fitchburg R. R. mentioned by said Abbott in his direct testimony, as follows:

FITCHBURG RAILROAD COMPANY,
PASSENGER AND TICKET DEPARTMENTS,
BOSTON, *Feb'y 21st*, 1882.

Jno. N. Abbott, Esq., G. P. & T. A. N. Y., L. E. & W. R. R., New York city.

DEAR SIR: We are in receipt of a letter from Hoag & Tasker, attorneys for a Mr. Winter, who purchased a regular unlimited ticket the 13th of this month from Boston to Milwaukee via your line. They write that he told your conductor that he wished to stop over for an hour or two at Olean; the conductor told
65 him there would be no objection. He got off at that place, and undertook to continue his journey in train leaving Olean at 11.15 p. m. The conductor of that train refused to accept his ticket, and put him off the cars, and would give no reason for this action except to tell him he must either get off or pay his fare. The next day he took your 10 a. m. train and presented the same ticket to the conductor, who took the ticket without question. On account of loss of time and a broken finger he threatens suit. Will you kindly inform me what you think of this matter, with full particulars why your conductor would not accept this ticket? This, I should judge, is a case for your company and not for ours. The ticket in question was sold at our depot office, Form A 300 # 298 Boston to Chicago, and Form H 150 No. 232 Chicago to Milwaukee.

Yours truly,
F. O. HEALD,
Act'g G. P. & T. A.

The said Abbott, on cross-examination, further testified, among other things, which other things were not material to the issue, as follows:

Q. Did you furnish your conductors with the rules and regulations in force on the road?
A. Yes, sir.
Q. Is this book here the thing you furnished them?
A. They were furnished with that.
Q. In '82 was this in force?
A. Yes, sir.
Q. Where is there anything in this book about stopping over?
66 A. There is nothing in it.
Q. There is nothing in it about stopping over at all?
A. No, sir.
Q. There was stopping over allowed?
A. Yes, sir.
Q. When this book was issued?
A. Yes, sir.
Q. There is no regulation about it?
A. No, sir.
Q. Now, Mr. Abbott, you say if a passenger asks for a stop-over check he was given one of these. Suppose he did not ask for one,

if he told the conductor he wanted to stop over what would the conductor do then?

A. If the point he wanted to stop over at was on the run of that conductor, if he indicated positively his desire to stop over the conductor would give him a stop-over check. If it was on the run of the conductor beyond he would tell him to apply to the next conductor.

Q. He would give him a stop-over check without his asking for it?

A. That would be a request.

Q. If he told the conductor he wished to stop over, and suppose the conductor didn't happen to have a stop-over check in his pocket, what would he do?

A. He would arrange for it in some other way. He would ascertain on what train he wanted to go and he could arrange
67 with the conductor that a passenger wanted to stop over and he didn't have a stop-over check to give him, and to let him pass or he might communicate by telegraph with the division superintendent, but in every case it is provided for.

Q. So there are other ways of doing it if the conductor did not have a stop-over check?

A. Yes, sir; it could be done in many other ways.

68 Erie Railway Company.

Stop-over Checks.

Increased privileges.

Notice to Passengers.

The following new rules and regulations respecting tickets over this railway will be in force from and after December 14th, 1874, to wit:

The privilege of stop-over will be granted only upon such forms of tickets and at such stations as the company shall designate.

Timely notice of desire to stop over must be given by the passenger to the conducter. If consistent with the company's rules, the conductor will thereupon issue a stop-over check in exchange for the original ticket. The stop-over check thus issued will be good if used within 30 days from date of issue, but after that time will be void and not accepted for passage; nor will a stop-over check be accepted for passage if defaced or mutilated, nor if presented by any other than the person to whom it was originally issued by the company.

(Hand pointing.) During thirty days it will convey to the passenger to whom issued the privilege of stop-over, not only at the one station for which issued, but also successively at the other intermediate stations named on the check between that and the destination.

The following are designated as "stop-over" stations:

69 Passaic,	Hancock,	Livonia,	Tonawanda,
Newark,	Deposit,	Avon,	Niag-ra Falls,
Paterson,	Susquehanna,	Geneseo,	Alfred,
Suffern,	Great Bend,	Mount Morris,	Genesee,
Turners,	Binghamton,	Caledonia,	Phillipsville,
Munroe,	Union,	Le Roy,	Belvidere,
Greycourt,	Campville,	Batavia,	Friendship,
Washingtonville,	Owego,	Addison,	Cuba,
Goshen,	Waverley,	Hornellsville,	Olean,
Montgomery,	Elmira,	Canaseraga,	Carrollton,
Middletown,	Corning,	Nunda,	Bradford,
Otisville,	Campbell's,	Portage,	Salamanca,
Port Jervis,	Bath,	Castile,	Little Valley,
Lackawaxen,	Avoca,	Gainesville,	Cattaraugus,
Narrowsburg,	Wayland,	Attica,	Dayton, N. Y.,
Hawley,	Blood's,	Warsaw,	Perrysburg.
Callicoon,	Springwater,	Alden,	

Conductors are positively prohibited from endorsing tickets.
By order of the president:

JNO. N. ABBOTT,
General Passenger Agent.

New York, December 8, 1874.

70 The said Abbott further testified on cross-examination that the notices in regard to stop-over and lay-over checks, which he testified were put up in the cars and stations of his company, were so put up and posted in the year 1874, and that he did not suppose that any of the same were there still remaining in the year 1882; and there was no evidence not herein reported that the same had ever been brought to the knowledge or notice of the plaintiff.

The witness also produced a regulation in regard to stop-over checks dated December 8th, 1874, substantially like the circular above annexed, which he said was posted up in all the depots, and had been in force ever since, and which was read to the jury.

He also presented a form of stop-over check, which is annexed, and the memorandum annexed, both of which were put in evidence.

(Here follows diagram marked p. 70*a*).

The defendant called also George B. Wright, who said: I was brakeman on the Erie road from 1853 to 1857, and was conductor from '57 to some months ago. In February, 1882, I was running what we call train one, that left Hornellsville at 8.55 in the evening. My run was then to Salamanca only, eighty-one miles. It was an express train. Olean was a regular stopping place; all trains stopped there. Alleghany was a signal station for my train; that is, if I had passengers to get off there I rung the bell. I remember
71 the night of the 14th of February, 1882; we arrived at Olean at 11.15. Mr. Winter, the plaintiff, got on at Olean. We had

two ordinary coaches, a smoking car, and what we call the ladies' car, and, behind, the sleeper. He was sitting in the ladies' car, on the left-hand side as the train was going west, about two-thirds of the way back. After leaving Olean I came through the train taking up tickets and came along to Mr. Winter and asked him for a ticket, and he presented this ticket, which was cancelled for the Western Division. It was cancelled by three punch-marks—two on the left-hand upper corner for the Susquehanna Division, and one on the lower left-hand corner, indicating that it had been punched through to Salamanca. I knew from the punch-marks that it was Conductor Hurty who had punched it. I took the ticket in my hand and said to Mr. Winter, "This ticket has been used to Salamanca and it is not good." I did not throw it back. I handed it back to him with the remark that I could not honor it from here to Salamanca. He said he had paid his fare and he should not pay it again; he was going to ride on that ticket. I told him if he went to Salamanca he would have to pay his fare; it was against our rules to accept tickets after they had been cancelled, except that he had a lay-over check. I told him if he did not pay his fare I should have to put him off. He said I could put him off if I chose; that he should not pay it, and if I put him off he would make it very warm for the company—words to that effect. I then told him if I stopped the train I could not accept his fare after stopping the train; if he got off the train it was against our rules then to receive fare from passengers. He
72 then said he should not pay; that I could put him off if I could. He then said he shouldn't pay; that I could put him off. I passed on and took up the rest of my tickets. I came back and said, "You have had ample time to think of this; what are you going to do?" He said, "Well, I am not going to pay it." I said, "Very well; I will have to put you off." I reached up to the rope, gave him time to reconsider; he did not, and I pulled the rope and stopped the train. I put my hand on his shoulder and said, "Come, you will have to get off." He got up and, I think, took hold of the back of the seat and said, "I want my baggage." He picked up a parcel, I can't say what it was, put it under his arm, and we walked out of the front end of the car without any further resistance. I called to my brakeman, who was standing at the rear of the car, and requested him to bring his baggage out, which he did. He stepped out to the platform and down onto the steps, on the lower step; he stood there for a few seconds and I said to him, "Come, I want you to get off; I am waiting for you." "Well," he said, "don't be in a hurry; I want to take my time;" and I just put my hand to his shoulder, without any force at all, and he stepped down onto the ground, a distance of about fifteen or sixteen inches.

Q. Did you push him any at that time?

A. I did not; no, sir.

Q. Go on.

A. He then said, "Well, I don't want to be left here; I can't be left here; my business is such that I must go at once"—to that

effect. I told him that he ought to have thought of that
73 before; that I gave him ample time to think of it, and told him the consequences if I stopped the train. I think that is about all the conversation we had.

Q. Now, going back, did he offer to pay his fare if you would give him a receipt for it?

A. No, sir.

Q. In the car?

A. No, sir; if he had I should have taken the fare and given a receipt. We give every passenger a receipt for money that they pay. We have a duplex ticket which is really a receipt—it is a receipt—which shows how far the passenger has ridden, and how much money he has paid; or if he had asked for it I should have given him a written receipt for his money.

Q. Is that a ticket you present at the office and get any part of the fare back?

A. Yes, sir; we get a rebate according to the distance we ride.

Q. Is it graded according to distance?

A. Yes, sir.

Q. Did you call any of the train hands to assist you?

A. No, sir.

Q. Or did any of the train hands take hold of Mr. Winter at all?

A. No, sir.

Q. When you got to the platform did you strike him or kick him or use your foot to press his hand off the rail or off the car?

A. I did not.

Q. Or use any violence whatever toward him?

74 A. Not any; it was not necessary.

Q. Was there any struggle on the steps of the car?

A. No, sir.

Q. When did the brakeman go into the car?

A. He was in the sleeping car, and he came in the car after the train stopped. He came in the rear end of the car with his baggage. He did not follow me out of the front end of the car.

(By the COURT:)

Q. The man was put out of the forward end of the car?

A. Yes, sir; out of the forward end of the car.

Q. Did you see the passenger when he stepped off onto the ground?

A. Yes, sir.

Q. Was there any blow or blows on his hand at that time administered by anybody?

A. No, sir; there was not.

Q. Did you offer to light him back to the station?

A. No, sir; I did not; I didn't think it was necessary.

Q. Why not?

A. Well, in fact, there was a station light, and about one-half of the car, the rear end of the car, stood at the platform, and he couldn't have been more than twenty or thirty feet from the light at the station; perhaps thirty feet.

Q. The lantern at the platform?

A. They have a regular station light that is hung up against the side — the building, a square light with an oil lamp inside of it.

75 Q. Did you notice at any time any light on the platform?

A. None, except this station light; there might have been a trackman's light there, but I didn't notice it.

Q. How long is the platform at that place?

A. I should say at that station the platform might be sixty feet; somewhere in that neighborhood; it might not be as much.

Q. And extended twenty feet beyond the building in the direction you were going?

A. Yes, sir.

Q. Now where do you say the car was, with reference to that platform?

A. The end that he got off of was the front, and that was better than half way—that is, the car was better than half way from the platform. It was right at the station, the sleeping car stood right at the station. I never said to Mr. Winter that he would not ride on that train that night "if I went to hell for it." I never said any such thing to him, or anybody else; am not in the habit of using that language. I did not use any harsh or profane language to him at all in any way. I accompanied him out on the platform. I stood right behind him. No one made any assault on him or struck him or kicked him or pushed him in any way from the time he started to go out until he got onto the ground. I did not see any package in his seat after he left.

On cross-examination the witness testified, among other things, that he knew when he saw the plaintiff's ticket that he had got on the train at Olean, and that Conductor Hurty had punched

76 it, and that Hurty had gone through on the last train before the witness's train, and that he did not suppose that the plaintiff had ridden on the coupon from Olean to Salamanca; that he did not say anything to the passenger, or he to him, about stop-over checks, and that Hurty would have taken the coupon up at Olean or Carrollton if the passenger had gone through to Salamanca once; also that tickets are punched once between Hornellsville and Salamanca, and that when he put the plaintiff off the train he supposed that he had a limited ticket, and so reported it to the defendant company.

In answer to the question "You thought it was a limited ticket?" the witness answered, "Well, yes, it was; but fact of its being cancelled, I could not honor it anyway; if cancelled we could not honor it;" and further testified, "I was satisfied in my own mind at that time that it was a limited ticket and I so made my report."

The defendant also called HIRAM HURTY, thirty years conductor on the defendant road from Elmira to Dunkirk. Was on train 3 going west. Took train at Elmira the morning of February 13, 1882. No recollection of any talk with this plaintiff on that morning, nor of seeing him before this case was tried at Lawrence. I was

familiar with the rules of the company in respect to the use of stop-over checks. The rule is embraced in the paper No. 151, instructions to conductors, now shown to me. Always had stop-over checks with me, never without them when on duty. If a passenger desired to stop off at Olean, my invariable practice was to take
77 up the ticket, punch out the lay-over check from where he said he wished to get off to the destination of the ticket or coupon, giving the year and day of the month and place at which he stopped and the destination of the ticket. I never failed, when a man held a ticket entitling him to a stop-over check, and when he asked me for it, to give it to him. I never took from a passenger a ticket, put extra holes in it, passed it back to him and tell him that would entitle him to stop over at Olean—never. I did not, on the morning of the 14th of February, 1882, take a ticket from any passenger who said he wanted to stop off at Olean and punch it and hand it back to him and tell him it was all right, or anything of like import or effect. It was a general occurrence to inquire about a train going down to Portville. I have no recollection of this man from any other; it was a thing of daily occurrence. My punch was a harp form. There was no other like it on the road. The punch-marks are known to the different conductors. Mine was a small harp. I identify this stop-over check; that is the kind in use at the time.

(By the COURT:)

Q. If a man wanted to stop over at Olean would you give him a check like that?

A. Yes; one saying Olean to Salamanca.

(By the COURT:)

Q. You would keep the ticket from Binghamton to Salamanca?

A. Yes; and make this good from Olean to Salamanca. I would tear it in two, give him the closed part in this (indicating), and pin this part and send it to the auditor of the road, so the passenger would not retain this coupon at all; and this ticket would be
78 good for him for thirty days to stop over.

On cross-examination the witness, among other things, which other things were not material to the issue, said: I was never without stop-over checks when on duty after they went into operation—never. I kept a train book or record of the trains, every car, day, and date, and number of every car we have in our possession, and time of arrival at every station we stop at. I have not this book now. I have destroyed it lately, thinking it was of no use.

On cross-examination witness, among other things, testified, in answer to the question: "When was the first time you were asked whether a passenger had told you on Feb. 14 that he wanted to stop over at Olean and take the evening train West." He said, "I was written a letter from our general passenger agent, how long after the occurrence I don't know, asking whether on Feb. 14 I had refused to give a stop-over check to a passenger. I replied that I hadn't refused if any passenger that had a ticket calling for one

wanted to stop." Witness further testified that when he took the train at Elmira there would be one punch in the coupon, Binghamton to Salamanca, a punch after Elmira, one after Hornellsville, so that there would be three punches at Olean and no more when Salamanca was reached; that directly after leaving Olean he took up coupons.

Q. Was this leaf pasted in your copy of the rules and regulations?
A. I don't know whether it was pasted; it was in it.
Q. The rule says "Punch and collect all tickets for passages to the next stopping place." When you collect the last coupon
79 before Salamanca don't you punch it?
A. No; it is cancelled; one punch cancels it on a division. The rule means local tickets, not through tickets.

The defendant also called CHAS. S. PHELPS, who said: I am a druggist. In February, 1882, I lived at Alleghany, and was on the train that night from Olean. I got off at Alleghany. Before I got off I saw the plaintiff in the car and heard some conversation between him and Conductor Wright. I saw Wright take the ticket, put on his glasses and examine it, and heard him tell him, as I supposed, the ticket was not good. After the plaintiff got off he showed me the ticket at the depot and it was cancelled. He complained of the indignity and disgrace of being put off and the delay it would cause him, and said he would make the company sweat for it. He did not say that he was hurt; didn't mention that to me. He said he had been up to Portville, and my recollection is that he said he had been up to see some parties that I knew, and he said that he found out that he could stop over at Portville from train 3 and take train 1 that night and make the same connections for Chicago. I asked him if he didn't know that the ticket was cancelled after he left Hornellsville. He said, "No; what do I know about it?" I told him on the Erie road they require a stop-over check when a person wants to stop off from the train, and he said, "Stop-over check! What do I know about a stop-over check?" I went with him to the hotel, which is about eight rods from there. The hotel was shut up, but I pointed him to the bell and gave him my address.
80 His counsel afterwards wrote to me. I replied. (The letter of the witness to plaintiff was produced and put in evidence.)

The said Phelps, on cross-examination, was asked, among other things, whether, in the conversation which he testified to having with the plaintiff at the station immediately after the plaintiff's expulsion from the defendant's train, the plaintiff had said anything about the conductor of No. 3 train in the morning, and thereupon gave the following evidence:

A. I presume he did. He must have mentioned his name. He must have mentioned the conductor.
Q. Well, did he? Just try to think what he said.
A. I don't believe I could tell you. He said something about his ticket and getting off at Olean.
Q. What did he say about that?

A. I couldn't recollect his words. The idea that was conveyed at that time was that he had given the conductor to understand that he wanted to get off at Olean, and I understood that he had friends there—I think he called them some friends—at Portville, and they were acquaintances of mine, and he said that he wanted—well, I wouldn't undertake to say, because I don't remember all he said.

Q. Your recollection was that he told you he had given the conductor to understand that he wanted to get off at Olean?

A. That is what he told me.

Q. Did he tell you that he told the conductor that he wanted to take the next train in the evening and wanted to know what
81 time it would be along?

A. Well, I can't say; I suppose he did.

Q. Then you said something to him about a stop-over check?

A. Yes, sir. I told him on the Erie road he would require a stop-over check. It seemed as if he ought to have the privilege to ride on the road.

Q. He told you that he never heard of a stop-over check?

A. He said, "What do I know about a stop-over check."

The defendant also called FRANK H. REASER, a druggist, who in 1882 was the station agent at Alleghany, and who, with his family, lived in a part of the station, and who testified that on the morning of the 15th of February, 1882, between seven and eight o'clock, the plaintiff was in the waiting-room of the depot and came to the office and inquired who the conductor was that was on the train the night before; that he then had a long conversation with the plaintiff about his being put off the train; did not say anything about being hurt, but should sue the company for insult; that he saw the plaintiff's hands, and neither one was swollen or injured; that during a part of the conversation the witness' wife and his assistant, Mr. Young, were also present.

The defendant also called KATE E. REASER, the wife of the last witness, who testified that she was present at the conversation on that morning, which was between seven and eight o'clock, as she went to call Mr. Reaser to breakfast, and that the plaintiff did not say anything about being hurt in being put off, and that when
82 she first saw him here in the hall of the court-house she pointed him out to her husband and said, "That is Mr. Winter."

The defendant likewise called JACOB E. YOUNG, the said assistant, who saw plaintiff on the morning of the 15th of February, 1882, in the waiting-room of the depot, and who testified to substantially the same conversation as Mr. and Mrs. Reaser.

Both Mr. and Mrs. Reaser, on cross-examination, among other things, testified positively that the plaintiff, at the time of the conversation which they testified to, in the waiting-room at Alleghany in 1882, wore a full beard and mustache just as he was doing at the time of the trial. The plaintiff and his wife, however, testified that the plaintiff, up to the time of receiving the injury complained of,

had never worn any beard, and that since the injury he had been unable to use his hand to shave, and therefore had worn a beard.

The plaintiff denied that he was at the station in Alleghany or in the waiting-room at all on the morning after his expulsion from the train, and denied having at any time the conversation testified to by Reaser, Mrs. Reaser, and Young. He testified that on said morning he started from the hotel, where he passed the night, without waiting to get breakfast, and drove back to Olean. He also testified that Reaser and Young were at said hotel playing billiards the night before, when he arrived there, and saw him bathing his injured hand, and stated the conversation which he had with them.

The defendant called JOHN C. PAIGE, who said: I reside in Binghamton, in the State of New York; am a lawyer by profession, and a member of the bar of that station. In 1882 was the gen-
83 eral agent of the Imperial Insurance, and for some years have practiced law only as incidental to that agency; have travelled frequently over the defendant road going to Cattaraugus and Dunkirk; know George B. Wright very well; used to meet him as conductor on the evening train; was a passenger on that train on the evening of February 14th, 1882. Mr. John J. Babcock and Mr. Young, a banker, were also passengers; saw Mr. Winter; he had a seat nearly opposite to mine; heard the conversation between him and Wright; Wright told him his ticket was cancelled to Salamanca. He said he had paid his fare once and should not pay it again. Wright told him the rules of the road forbade his taking a cancelled check, and he must pay his fare or he should have to put him off. Wright left him, went back and took up his other tickets, and then came along again and asked him what he was going to do. He said he would not pay, and dared Wright to put him off. Wright put his hand on his shoulder and he got up and walked through the isle to the door without resistance. There was no force used and none was necessary. He got off at the station. The window was open and I looked out. A passenger got off at the station at the other end of the car. It was warm and pleasant. There was a light at the station. Wright asked me to make a memorandum of the occurrence in my diary, which I did and have it here. There was only one brakeman in the car.

On cross-examination Mr. Paige was asked to produce the memorandum which he testified to having made in his diary, and did so. The memorandum was as follows: "Witness put off pass. at Alleghany." He further testified on cross-examination, among
84 other things, as follows: That he made the memorandum at the request of Conductor Wright; that he did not hear anything said in the car about a receipt; that he remembered the passenger said he had stopped over at Olean; that Wright said the ticket was punched for the Erie Division and he couldn't take it; that Wright then said that the ticket had been used over that division. The passenger said it had not been used beyond Olean. There was something said about stop-over check, but cannot remember it. There was that commotion in the car—loud talk—and I

stepped, as a passenger would, to look out of the window. His going out so gently attracted my attention, and I stepped over to see if anything occurred. I thought there would, probably, from the loud talk. I think the window was up when I stepped across the isle. I thought he took hold of the arm of the seat or leaned over it to get his baggage. Babcock was travelling with me that night. There was a lantern sitting on the platform of the station abreast of the window. It might have come from my train. I saw persons at the forward end of the car down on the ground when I looked out. It was not a cold night. My attention was first called to this occurrence two or three years after, about a year and a half ago, several months before the trial, in March, 1886. Wright directed my attention to it at my house at Binghamton; asked me what I remembered, and gave me the date; told me he requested me to make a memorandum. He may have told me his recollection of it. The next interview I had with him on the subject was on the same car going to Lawrence. I think he also told me his recollection of it this time in Boston.

85 The defendant called JAMES M. MOSHER, who testified that he was the brakeman on Wright't train on the evening of the 14th February, 1882. He was the only brakeman in the car when the plaintiff was put off. There was no resistance and no force used. He testified that the plaintiff, on first rising from his seat when told by Wright that he must leave the train, took hold of the back of the seat, but afterwards let go and proceeded towards the door, followed by Wright. There was no resistance and no force used; that he, witness, then took a satchell from plaintiff's seat, went out at the rear end of the car and came round to the front end of the car with his lantern, and was there when the defendant got off. He let go of the rail of his own accord. It was right at the platform of the depot, which was even with the ground. The sleeping car was stopping directly opposite the depot.

The defendant also called JOHN J. BABCOCK, who said: I am the general agent of the Springfield Insurance Company. I was a passenger of this train on the night of February 14th, 1882. I was conversing with Mr. Hugh Young, a banker, who sat in front of me. My impression is I was sitting turned round. I saw Conductor Wright give the ticket back to plaintiff, and heard him tell him it was cancelled to Salamanca and he must pay his fare. He did not throw the ticket back, but handed it to the passenger. I did not hear him say he wanted a receipt. Conductor warned him and then pulled the rope. There was no resistance, except when he first got up put his hand on the top of the seat just enough to
86 show he did not go out voluntarily. No other brakeman came in but Mosher; no one else in the isle but conductor, brakeman, and myself. I walked out to see what was going on. There was no force used on the platform—only Wright and me there. The brakeman was down on the ground. Car stopped and plaintiff got off right at end of platform of depot; not a cold

night. I never exchanged a word with plaintiff; no such remark as Winter testified, "If I go to hell for it," in my hearing.

Witness also testified that when he was on the car platform he saw the brakeman reach up and take hold of the passenger's arm and pull his arm off—pull his hand off the rail—his right arm.

The defendant called ALFRED MCKENZIE, who testified only to conversation with the plaintiff, in which he testified that the plaintiff told him that he received the injury to his hand by getting it caught and twisted in the railing when he was pushed off the platform.

Also Dr. OCTAVIUS B. SHREVE, who testified to the nature and probable cause of the injuries complained of by the plaintiff, and also as to conversation with the plaintiff in the course of examinations of his hand and wrist. Dr. Shreve also testified that the plaintiff had caries of the wrist.

On cross-examination among other things he testified that an injury to the hand and fingers received in the manner in which the plaintiff testified he was hurt when he was pushed from the platform would be an adequate cause to account for the condition in which the evidence introduced by the plaintiff tended to show his hand and wrist had since been, including the caries,
87 although the same can be produced by other causes.

Finally the defendant called ALBERT T. KIMBALL, the assistant passenger ticket agent at the Fitchburg depot in 1882, mentioned by Daggett, and who testified: I do no- recollect selling a ticket to plaintiff. On being shown the ticket annexed and asked if in selling a ticket like that he ever made any representation to the purchaser of such ticket that he could stop over on speaking to the conductor, he said: Never to my knowledge. In selling unlimited tickets our practice was to tell the purchaser to apply to the conductor for a stop-over check, supposing that the rules of the road over which he was passing admitted of it. He must get a check from the conductor to stop. I never varied from that practice.

On cross-examination the witness was asked: "Now, if a person said at that time he went into your office and asked for a ticket of that description and said he wanted to stop over at Olean, and there had been a recent change of rates, and you looked up the matter to find out *what* that kind of a ticket would enable him to stop over at Olean and what he would have to pay for it, and you found it and found that it would cost three dollars more than a limited ticket, on which he could not stop over; if he said you sold him that ticket; that he came into the office and bought it and paid for it, and you told him that he could stop over on that ticket by speaking to the conductor, you would not deny but what that statement might be true?"

A. Possibly. It is possible.

The conductor of the train on which the plaintiff testified,
88 as hereinbefore set forth, that he rode from Olean to Salamanca on the morning after his expulsion from the defend-

ant's train as aforesaid, was not called as a witness, and there was no evidence that said conductor was not still in the service of the defendant company.

It appeared that the distance from Olean to Salamanca is about eighteen miles.

This is all the evidence introduced on either side material to the issue as it went to the jury.

Before the arguments were begun the defendant requested the presiding justice to rule as follows:

1. The regulation of the defendant corporation that the several conductors of its trains shall require of each passenger a valid ticket or pay the established fare is a necessary and proper regulation, and if the plaintiff in this case, having, as he says, taken defendant's train at Olean for Salamanca, did not when thereto requested present to the conductor a valid ticket, but only a ticket that had been cancelled, and refused to pay his fare, then the conductor had the lawful right to stop the train at an intermediate station or near to a dwelling-house and put the plaintiff off the train, using only such force as was necessary for that purpose; and if after being so put off he offered to pay his fare the conductor was not required to permit him to retake the train.

2. The regulation of the defendant that a passenger who desires to stop over at an intermediate station and resume his
89 passage by a later train must, before leaving the first train, require of the conductor a stop-over check is a reasonable regulation; and since in this case it appears by the plaintiff's own testimony that his ticket from Binghamton to Salamanca was cancelled before he left the train and he did stop over at Olean, an intermediate place, and resumed his passage the next day and presented no stop-over check, but only the cancelled ticket, and refused to pay his fare when requested and persisted in that refusal, the conductor had the lawful right to stop the train at the intermediate station, as he did, and put the plaintiff off the train.

3. Even if it be assumed that the first conductor told the plaintiff it would be all right for him to stop over without giving him a stop-over check, still the second conductor was bound by the regulation of the defendant company to require a valid ticket or over-stop check or payment of the fare, and was justified in putting the plaintiff off the train upon the plaintiff's refusal to comply with his request. This second conductor did no wrong; and since this action is not for the wrong, if any, done by the first conductor, but only for what the second conductor did, this action cannot be maintained.

4. It cannot be maintained for any unnecessary force, because not only all the evidence shows there was none, but the plaintiff testifies there was none.

5. Upon the whole evidence the plaintiff cannot maintain this action.

90 6. Taking all the evidence in the case relative to the sale of the ticket as to what was said at the time of the sale by the ticket seller, it would not justify the plaintiff in persisting to retain

his seat after his fare was demanded and he refused to give the conductor a valid ticket or stop-over check or pay his fare.

7. Taking all the evidence as to the sale of the ticket, there is nothing which would exonerate the plaintiff from presenting to the conductor who removed him a stop-over check.

8. Taking all the evidence in the case relative to the sale of the ticket, it is not shown that the ticket-seller had any right or undertook to waive the rules of the defendant road or that he had any authority to waive these rules.

9. The plaintiff was bound by the stipulations of his ticket to conform to the rules of the defendant road, one of which was that if he wished to stop over he must procure a stop-over check.

10. The conductor had an equal right to put the plaintiff off at a regular station where other passengers stopped as at a station where he stopped expressly for that purpose.

11. Assuming the plaintiff's story of the manner in which he was put off the train to be true, there is still no evidence that any unnecessary force was used.

After these prayers were presented to the presiding justice the plaintiff's counsel stated that he should not claim to the jury that more force was used in expelling the plaintiff from the train than was necessary to overcome his resistance; and thereupon the defendant requested this further ruling.

91 It being now conceded that no more force was used in putting the plaintiff off the car than was necessary for that purpose, and that the conductor gave the plaintiff timely warning that unless he paid his fare he should put him off, the plaintiff cannot recover for damages for an injury caused by his obstinacy in persisting to remain on the cars after he knew the conductor would put him off. He cannot recover for an injury which he voluntarily brought upon himself.

The court declined to give the instructions prayed for by the defendant, except so far as they are included in the following instructions, and instructed the jury that if the plaintiff's testimony was true in regard to what took place between himself and the ticket agent in Boston, and afterwards with the first conductor on the defendant's train, and if the plaintiff, when he bought his ticket in Boston, informed the ticket agent of his wish to stop off at the Olean station and was then told by the ticket agent that he would have to speak to the conductor about that, and between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean and the conductor, instead of giving the plaintiff a stop-over ticket, punched the plaintiff's ticket and told him that was sufficient to give him the right to stop over at Olean and afterwards to use the punched ticket between Olean and Salamanca, then, whatever the rules and regulations of the road were, the plaintiff was rightfully a passenger on the train at the time of his expulsion and the conductor had no right to put him off for not paying his fare, and the company was liable for the act of the

92 conductor; that if, on the other hand, the plaintiff did not notify the conductor of his wish to stop over at Olean and

received no such assurance from the conductor or from the ticket agent as he has testified, then the punched ticket gave him no right to ride as a passenger on the train between Olean and Salamanca without paying his fare, and if he refused to pay his fare when demanded the conductor was justified in putting him off, and his offer to pay his fare after the train was stopped was too late, and did not give him the right to ride on the train, and the conductor was justified in expelling him, notwithstanding the offer.

The court further instructed the jury that the conductor had no right to put the plaintiff off for not paying his fare except at a regular station on the road or near a dwelling-house, and if the conductor put him off elsewhere than at a station or near a dwelling-house the defendant was liable, even although the plaintiff was wrongfully on the train for refusing to pay his fare.

Further instructions were given upon the subject of damages, to which the defendant took no exception.

The defendant duly excepted to the admission of the testimony of the plaintiff as to his conversation with the ticket agent who sold him his ticket, and also duly excepted to the refusal of the court to give the instructions asked for by the defendant and to the rulings and instructions given by the court to the jury. The jury found for the plaintiff ($10,000 damages), and, in answer to the questions propounded to them by the court, stated that they found that the
93 plaintiff was entitled to ride on the train, and as to the question whether he was put off at a station or near a dwelling-house they were not agreed. The defendant, being aggrieved by said refusal to give the rulings asked by it and by the rulings and instructions given by the court, presents this *his* bill of exceptions, and prays that the same be allowed.

NEW YORK, LAKE ERIE &
WESTERN RAILROAD CO.,
By their attorney, SETH J. THOMAS.

The foregoing bill of exceptions is allowed as of June 9, 1887, the date of the rendering of the verdict herein, and before the jury left the bar.

THOMAS L. NELSON,
Dist. Judge.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

94 Circuit Court of the United States, District of Massachusetts, May Term, 1887.

DAVID T. WINTER
v.
NEW YORK, LAKE ERIE AND WESTERN R. R. Co. } 2749, Law Docket.

Assignment of Errors and Prayer for Reversal. (*Filed Mar.* 29, 1888.)

And now comes the defendant in said action and assigns the following errors:

First. The court should have ruled, as requested, that:

The regulation of the defendant corporation that the several conductors of its trains shall require of each passenger a valid ticket or pay the established fare is a necessary and proper regulation, and if the plaintiff in this case, having, as he says, taken the defendant's train at Olean for Salamanca, did not, when thereto requested, present to the conductor a valid ticket, but only a ticket that had been cancelled, and refused to pay his fare, then the conductor had the lawful right to stop the train at an intermediate station or near to a dwelling-house and put the plaintiff off the train, using only such force as was necessary for that purpose; and if, after being so put off, he offered to pay his fare, the conductor was not required to permit him to retake the train.

95 Whereas the court refused so to rule.

Second. The court should have ruled, as requested, that:

The regulation of the defendant that a passenger who desires to stop over at an intermediate station and resume his passage by a later train must, before leaving the first train, require of the conductor a stop-over check is a reasonable regulation; and since in this case it appears by the plaintiff's own testimony that his ticket from Binghamton to Salamanca was cancelled before he left the train, and he did stop over at Olean, an intermediate place, and resume his passage the next day, and presented no stop-over check, but only the cancelled ticket, and refused to pay his fare when requested and persisted in that refusal, the conductor had the lawful right to stop the train at the intermediate station, as he did, and put the plaintiff off the train.

Whereas the court refused so to rule.

Third. The court should have ruled, as requested, that:

Taking all the evidence in the case relative to the sale of the ticket as to what was said at the time of the sale by the ticket-seller, it would not justify the plaintiff in persisting to retain his seat after his fare was demanded and he refused to give the conductor a valid ticket or stop-over check or pay his fare.

Whereas the court refused so to rule.

Fourth. The court should have ruled that:

Taking all the evidence as to the sale of the ticket, there is nothing which would exonerate the plaintiff from presenting to the conductor who removed him a stop-over check.

96 Whereas the court refused so to rule.

Fifth. The court should have ruled that:

Taking all the evidence in the case relative to the sale of the ticket, it is not shown that the ticket-seller had any right or undertook to waive the rules of the defendant road, or that he had any authority to waive these rules.

Whereas the court refused so to rule.

Sixth. The court should have ruled, as requested, that:

The plaintiff was bound by the stipulations of his ticket to conform to the rules of the defendant road, one of which was that if he wished to stop over he must procure a stop-over check.

Whereas the court refused so to rule.

Seventh. The court should have ruled that:

Even if it be assumed that the first conductor told the plaintiff it would be all right for him to stop over, without giving him a stop-over check, still the second conductor was bound by the regulation of the defendant company to require a valid ticket, or stop-over check, or payment of the fare, and was justified in putting the plaintiff off the train upon the plaintiff's refusal to comply with his request. This second conductor did no wrong. And since this action is not for the wrong, if any, done by the first conductor, but only for what the second conductor did, this action cannot be maintained.

Whereas the court refused so to rule.

Eighth. The court should have ruled, as requested, that:

97 It cannot be maintained for any unnecessary force, because not only all the evidence shows there was none, but the plaintiff testifies there was none.

Whereas the court refused so to rule.

Ninth. The court should have ruled, as requested, that:

It being now conceded that no more force was used in putting the plaintiff off the car than was necessary for that purpose, and that the conductor gave the plaintiff timely warning that unless he paid his fare he should put him off, the plaintiff cannot recover for damages for an injury caused by his obstinacy in persisting to remain on the cars after he knew the conductor would put him off. He cannot recover for an injury which he voluntarily brought upon himself.

Whereas the court declined so to rule.

Tenth. The court should have ruled, as requested, that:

Upon the whole evidence the plaintiff cannot maintain this action.

Whereas the court declined so to rule.

Eleventh. It was error to instruct the jury, as the court did, "that if the plaintiff's testimony was true in regard to what took place between himself and the ticket agent in Boston, and afterwards with the first conductor on the defendant's train, and if the plaintiff, when he bought his ticket in Boston, informed the ticket agent of his wish to stop off at the Olean station, and was then told by the ticket agent that he would have to speak to the conductor about that, and between Binghamton and Olean the plaintiff informed

98 the conductor that he wished to stop over at Olean, and the conductor, instead of giving the plaintiff a stop-over ticket, punched the plaintiff's ticket, and told him that was sufficient to give him the right to stop over at Olean, and afterwards to use the punched ticket between Olean and Salamanca, then, whatever the rules and regulations of the road were, the plaintiff was rightfully a passenger on the train at the time of his expulsion, and the conductor had no right to put him off for not paying his fare, and the company was liable for the act of the conductor. Wherefore the said defendant prays that the judgment herein may be reversed.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO.,

By their attorney, SETH J. THOMAS.

99 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled David T. Winter, plaintiff, *v.* The New York, Lake Erie and Western Railroad Company, defendant, lately determined in said circuit court, and of all proceedings therein and of the assignment of errors and prayer for reversal filed therein.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

JOHN G. STETSON, *Clerk.*

100 Know all men by these presents that we, the New York, Lake Erie and Western Railroad Company, otherwise called the Erie Railroad Company, a corporation established under the laws of the State of New York and having a place of business in the Commonwealth of Massachusetts, as principal, and Asa P. Potter and Jonas H. French, both of the city of Boston, in said Commonwealth of Massachusetts, as sureties, are held and firmly bound unto David T. Winter, of Peabody, in said Commonwealth, in the full and just sum of fifteen thousand dollars, to be paid to the said David T. Winter, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the seventeenth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the said David T. Winter, plaintiff, and the said New York, Lake Erie and Western Railroad Company, defendant, judgment was rendered against the said defendant, and the said defendant having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, [L. S.]
By JOHN KING, *President.*

Signed, sealed, and delivered in presence of—
ASA P. POTTER. [L. S.]
JONAS H. FRENCH. [L. S.]

Witness to sureties:
SETH J. THOMAS.

Attest: A. R. MACDONOUGH, *Secretary.*

Approved:
THOS. L. NELSON, *Dist. Judge.*

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.
Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

101 The United States of America to David T. Winter, of Peabody, in the county of Essex and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein The New York, Lake Erie and Western Railroad Company, otherwise called The Erie Railroad Company, a corporation established under the laws of a foreign jurisdiction and having a place of business in said Commonwealth, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas L. Nelson, district judge of the United States for the district of Massachusetts, sitting in said circuit court, this twentieth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

THOS. L. NELSON,
District Judge.

Due, sufficient, and legal service of the foregoing citation is accepted.

IVES & BRIGHAM,
Att'ys for Plaintiff.

[Endorsed:] Citation.
Endorsed on cover: Massachusetts C. C. U. S. No. 169. The New York, Lake Erie & Western Railroad Company (otherwise called The Erie Railroad Company), plaintiff in error, *vs.* David T. Winter. Filed October 8, 1888.

Office Supreme Court U. S.
FILED.
DEC 16 1891
JAMES H. McKENNEY
CLERK

143-60.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 169.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

DAVID T. WINTER.

BRIEF FOR THE PLAINTIFF IN ERROR.

SETH J. THOMAS,
CALVIN P. SAMPSON,
Of Counsel.

Supreme Court of the United States.

NO. 169. OCTOBER TERM, 1891.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

DAVID T. WINTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action by a passenger against a railroad company for putting him off one of its trains. The writ has two counts, in the first of which the plaintiff says he was the owner of a ticket which entitled him to a passage over the defendant's road from Binghamton to Salamanca, and that while such passenger between Binghamton and Olean the defendant's agent in charge of said train, at his request punched his said ticket, so that he was entitled to stop over at Olean, and returned the ticket to him. He says he did stop over at Olean, and on the next day took a train on the defendant's road at that place for Salamanca, and offered the ticket so punched to the defendant's agent in charge of the last-mentioned train, which the said agent refused to accept, and demanded payment of a cash fare from Olean to Salamanca, and upon the plaintiff's refusal to pay such fare forcibly ejected him from the car in which he was riding, and removed him from the train, and that by means of such forcible ejectment he sustained severe and painful injuries, and lost his baggage and certain valuable papers. In the other count it is alleged that the defendants, by their agents and servants, made an

assault upon him, and ejected him from the cars in which he was lawfully travelling, and did him serious personal injury, and subjected him to indignity. (Rec., page 4).

The answer denied each and every allegation in the plaintiff's writ and declaration contained, and alleged that the truth was that the plaintiff took the train at Olean, and when the conductor called for a ticket the plaintiff handed him one which was cancelled from Olean to Salamanca, which the conductor then told him was not good, and that he must pay his fare to that place, which the plaintiff refused to do. The conductor then told him that under the rule of the road he should be obliged to stop the car at the next station and put him off, which the plaintiff told him he might do if he dared. On arriving at the next, which was the Alleghany station, the plaintiff still refusing to pay his fare, the conductor stopped the car and put him off, using no more force than was necessary for that purpose. The answer further alleged that the plaintiff had no lawful right to be transported over said road to Salamanca, but was travelling on the same in violation of a uniform rule of the road, which was fully explained to the plaintiff before he was put off, and that if he suffered any injury to his person, his property or his feelings it was due solely to his own wrong.

Facts.

The plaintiff was first called as a witness, and testified: —

"I live in Peabody, Mass., and have lived there since 1876. My occupation is machinist and inventor; am thirty-eight years of age. My business has compelled me to travel about a great deal. I paid during the year 1881 about one thousand dollars for car fare; travelled in this country by railroad and steamboat lines; had occasion in the early part of 1882 to go West, to Milwaukee, to set up machinery there, and to Detroit. Before I started to Milwaukee, I had occasion to go to New York State, — to Portville, Cataraugus County. The way to get there was by Binghamton, New York, and Olean, then by way of a cross road to Portville, which intersected the main line at Olean. Portville is about six miles south from Olean. My first business was in Portville. I had been to Portville before then, but not by that route. I came from Peabody

to Boston, and went to the Fitchburg station to buy my ticket. I found the ticket agent in the office."

The plaintiff was then asked if he told the agent anything. The conversation between the plaintiff and the ticket seller was objected to; the objection was overruled and the exception saved. The plaintiff thereupon testified, page 22: —

"I told the agent I wanted to go to Milwaukee, and wanted to buy a ticket for that place which would enable me to stop off at a place called Olean, in New York State. He said he was not able to tell me just then what the ticket would cost, as a change was made in the rate that day: would I come inside the station? I was then on the platform in the depot; he was in the ticket office. . . . I went into the waiting room. He took some time to look it up, and then told me what the ticket would cost. It was somewhere about twenty-six dollars." And being asked if the ticket seller told him anything about the price of that ticket as compared with the price of the other ticket, he answered: "Yes, if I didn't have to stop over at Olean my ticket would cost three dollars less; but the fact of buying an unlimited ticket, which would give me the right to stop over, would cost three dollars more, and that was the amount named, three dollars." And being asked if anything else was said, he answered: "I asked him to give me a ticket of that description, — an unlimited ticket. He took the ticket, prepared it for me, — stamped it, or whatever he did, — and handed me the ticket, and I handed him the money. I said, 'Conductor, this ticket is all right; it is printed "limited ticket," and he said,' Yes; it is all right; it will allow you to stop over by speaking to the conductor'" (page 22).

A full copy of the ticket is here inserted (page 29): —

When the plaintiff arrived at Binghamton the three lower coupons had been given up. Hornellsville is between Binghamton and Olean. The plaintiff testified that on leaving Hornellsville the conductor came into the car and took the plaintiff's ticket and punched the coupon from Binghamton to Salamanca, and while he was punching it the plaintiff said to him (page 25): "Conductor, I want to stop off at Olean"; and I said: "Will we catch the train which left Buffalo this morning at eight o'clock, and which ought to intersect this one; will we get it so I can get to a place called Portville this

morning? As we are late, I thought I would ask you the question." He said "Yes, we will; that train gets Southern passengers from this train, and waits for us if we are late." I said: "I want to get off there"; and he said, "I will fix you all right"; the ticket then in his hand. He gave me the ticket with the coupon on it punched. This testimony was repeated, but nothing was added to it. Nothing further was said, and nothing was done. No stop-over check was asked for, and none given. If what the plaintiff testified the conductor said was true, it was a promise to do something which he never did. It ended with the statement by the conductor: "I will fix you all right."

The plaintiff testified that he left the train at Olean, went to Portville, came back to Olean the same day and took the train for Salamanca that night. The conductor came for his ticket. He handed the conductor the punched coupon. The conductor looked at it "a minute," and told him it was not good, and that he must pay his fare to Salamanca. He said he had paid his fare once, and should not pay it again. The conductor told him if he did not pay it he should be obliged to stop the car at the next station and put him off. He continued to refuse to pay. The conductor stopped the car at the Alleghany station, and put him off. The fare from Olean to Salamanca was sixty cents. The plaintiff's relation of this conversation, and of what happened in putting him off, will be found on pages 26, 27 and 28 of the record. It will be noticed that he called no witness to corroborate his strange and improbable story, and was contradicted by Wright, the conductor who put him off, page 39; and by Mosher, the brakeman present, page 47; by Paige, page 46; and Babcock, page 47, and Phelps, page 44, passengers on the train; by Young and Reaser and Mrs. Reaser, page 45, who conversed with him the next morning; and by Daggett, his own witness, page 29, and Kimball, the assistant ticket agent at the Fitchburg station, page 48, as to what took place at the sale of the ticket. But under the instructions of the Court, hereafter to be noticed, the jury have found for the plaintiff, and we take his statement as we must. It is, however, a part of our case, that after the prayers were presented to the presiding judge, the plaintiff's counsel stated that he should not claim to the jury that more force was used in

expelling the plaintiff from the train than was necessary to overcome his resistance. The plaintiff stated that he was an inventor (page 21), and he proved it by his story.

All the testimony of the plaintiff in regard to the damage he sustained and his conversation with the ticket agent were given against the objection of the defendant, with the reservation that his exceptions were to be saved at the proper time; (page 29).

The defendant put in evidence the ticket (page 28), and the plaintiff testified that, except the number and the punch marks, and the word "sample," and lines in red ink, it was like the ticket he bought; (page 29). The witness Daggett, called by the plaintiff, also said the ticket annexed is the same form as that sold the plaintiff, and is unlimited. To make it limited, he would cancel out the year, month and date, and put an L punch in each of the coupons; (page 30).

The defendant put in evidence the statutes of New York, which provided that railroad corporations, among others, organized under the law of New York, may make all needful and reasonable regulations relative to the conveyance of passengers and the general management of their business, and also that if any passenger shall refuse to pay his fare it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars — using no unnecessary force — at any stopping place, or near any dwelling house, as the conductor shall elect on stopping the train; (page 32. Laws of New York, seventy-third session, 1850, Chap. 140, Sect. 35). The defendant also put in evidence the printed regulations of the defendant company relative to stop-over checks, which have been in force since 1874, and a book of instructions for the running of trains, which went into effect in 1872, which, with the testimony of Mr. William M. Abbott, will be found on pages 32 to 39. The witness Daggett, called by the plaintiff, identified the ticket presented to him as a copy, and testified, among other things (page 30), "A limited ticket gives no right to stop over. An unlimited ticket gave him the privilege to stop over by getting a check of the conductor, subject to the rules and regulations of the road over which he passed. We should tell him he must get a stop-over check from the conductor." And in answer to

a question (page 31), he said: "In an unlimited ticket, in respect of time, or in any other respect, nevertheless, if they want to stop over they must conform to the rules and regulations of the road to get a stop-over check." He did not sell this ticket personally, nor have any conversation with the plaintiff. It was probably sold by his assistant Kimball, while he was out. The defendant called Mr. Kimball, who testified, among other things (page 48): "In selling unlimited tickets, our practice was to tell the purchaser to apply to the conductor for a stop-over check, supposing that the rules of the road over which he was passing admitted of it. He must get a check from the conductor, to stop. I never varied from that practice." It will also be noticed that the ticket states on its face that it is good for one first-class passage "subject to the following contract," and that "no stop-over will be allowed hereon unless specially provided for by the local regulations of the road over which it reads."

All the essential facts in the case are reported. No complaint is made in the declaration of anything said or done by the ticket seller or the first conductor, and nothing is said about the purchase of the ticket. The plaintiff's complaint is that another conductor put him off the train. All his testimony, respecting his conversation with the ticket seller was duly excepted to; (pages 22, 29, 51).

Assignment of Errors.

First. The Court should not have permitted the plaintiff against defendant's objection (pages 22, 29, 51) to testify to conversation he claimed to have had with the ticket seller in the office of the Fitchburg Railroad Company at Boston, which conversation as stated included a representation by said ticket seller in excess of his authority as an agent for the defendant, and operated to permit the plaintiff to alter and contradict by oral evidence the terms of the written contract incorporated in the ticket.

See bottom of page 22: "It will allow you to stop over by speaking to the conductor."

And the Court should not have submitted the evidence as to that conversation to the jury (as set forth in the eleventh assignment of

error, Record, page 53) without proper instructionsas to the scope of the ticket seller's authority to bind the defendant by his representations, and also as to the law forbidding the contradiction of the terms of a written contract by oral evidence.

Whereas the Court ruled (page 50) that "If the plaintiff's evidence was true in regard to what took place between himself and the ticket agent in Boston and afterwards with the first conductor on the defendant's train, and if the plaintiff when he bought the ticket in Boston informed the ticket agent of his wish to stop off at the Olean station, and was then told by the ticket agent that he would have to speak to the conductor about that, and between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean, and the conductor instead of giving the plaintiff a stop-over ticket punched the plaintiff's ticket and told him that was sufficient to give him the right to stop over at Olean, and afterward to use the punched ticket between Olean and Salamanca, then, whatever the rules and regulations of the road were, the plaintiff was rightfully a passenger on the train at the time of his expulsion, and the conductor had no right to put him off for not paying his fare, and the Company was liable for the act of the conductor."

Further, the Court erred in this instruction in not stating the testimony as to what was said by the first conductor as it was given. See pages 25, 43 of record.

The instruction above quoted and set out in the defendant's eleventh assignment of error on the record was erroneous in law.

SECOND. The Court should have ruled, as requested, that "The regulation of the defendant corporation — that the several conductors of its trains shall require of each passenger a valid ticket or pay the established fare — is a necessary and proper regulation, and if the plaintiff in this case having, as he says, taken the defendant's train at Olean for Salamanca, did not when thereto requested present to the conductor a valid ticket, but only a ticket that had been cancelled, and refused to pay his fare, then the conductor had the lawful right to stop the train at an intermediate station or near to a dwelling house and put the plaintiff off the train, using only such force as was necessary for that purpose."

Whereas the Court refused so to rule.

See first prayer, page 49, and first assignment of error, page 52.

THIRD. The Court should have ruled as requested, — that "The regulation of the defendant that a passenger who desires to stop over at an intermediate station and resume his passage by a later train must before leaving the first train require of the conductor a stop-over check is a reasonable regulation, and since in this case it appears by the plaintiff's own testimony, that his ticket from Binghamton to Salamanca was cancelled before he left the train, and he did stop over at Olean, an intermediate place, and resumed his passage the next day and presented no stop-over check, but only the cancelled ticket, and refused to pay his fare when requested, and persisted in that refusal, the conductor had the lawful right to stop the train at the intermediate station, as he did, and put the plaintiff off the train."

Whereas the Court refused so to rule.

See second assignment of error, page 52, record.

FOURTH. The Court should have ruled as requested,—that this action "cannot be maintained for any unnecessary force, because not only the evidence shows there was none but the plaintiff testifies there was none."

Whereas the Court refused so to rule.

See fourth prayer, page 49, and eight assignment of error, page 53.

FIFTH. The Court should have ruled as requested, that,—"Upon the whole evidence, the plaintiff cannot maintain this action."

Whereas the Court refused so to rule.

See fifth prayer, page 49; tenth assignment of error, page 43.

SIXTH. The Court should have ruled as requested, that,— "The plaintiff was bound by the stipulations of his ticket to conform to the rules of the defendant road, one of which was that if he wished to stop over he must procure a stop-over check."

Whereas the Court refused so to rule.

See ninth prayer, page 50; sixth assignment of error, page 52.

SEVENTH. The Court should have ruled as requested, that,—"It being now conceded that no more force was used in putting plaintiff off the car than was necessary for that purpose, and that the conductor gave the plaintiff timely warning that unless he paid his fare he should put him off, the plaintiff cannot recover for damages for an injury caused by his obstinacy in persisting to remain on the cars after he knew the conductor would put him off. He cannot recover for an injury which he voluntarily brought upon himself."

Whereas the Court refused to so rule.

See last prayer, page 50; ninth assignment of error, page 53.

EIGHTH. The Court should have ruled as requested, that,—Taking all the evidence in the case relative to the sale of the ticket, it is not shown that the ticket seller had any right, or undertook to waive the rule of the defendant road, nor that he had any authority to waive these rules.

Whereas the Court refused so to rule.

Eighth prayer, page 50, and fifth assignment of error, Record, page 52.

LAW.

I.

The first exception related to the admission of the testimony of the plaintiff as to his conversation with the ticket seller.

Whether there is such proof of agency as to warrant admission of the acts and declarations of the agent in evidence is a preliminary question for the Court.

U. S. v. *Clicquot's Champagne*, 3 Wallace, 114.

In the case at bar the ruling of the presiding judge, in this respect, was erroneous. Neither an agency nor the authority of an agent can be proved by the testimony of a witness to conversations with the supposed agent out of court. We excepted to this evi-

dence (page 22) at the trial; our exception was duly saved, and the admission of it is assigned as error (page 53).

A person employed by a Massachusetts railroad company to sell, at its office in Boston, tickets over its own road, with coupons over the roads of other companies in other States, has no implied authority in the sale of such ticket to bind any such other company by representations contradictory to, or beyond the terms expressed on the ticket or coupon; and before evidence of such representations is admissable, the authority of such seller must be shown. The sale of the ticket simply furnishes no presumption of such authority. Apparently, the terms expressed on the ticket are all that the New York company has assented to. It cannot be said that the proper evidence was supplied afterward, since the witness Daggett, the only witness whom the plaintiff subsequently called, testified that he had no such authority, and did not sell the ticket, and was not present at the sale, and of course had no such conversation as the plaintiff testified to (pages 30, 31). And the witness Kimball, called by the defendant, on being shown the ticket annexed, testified that he never made any such representation as the plaintiff related, adding that his practice was to tell the purchaser to apply to the conductor for a stop-over check, supposing that the rules of the road over which he was passing admitted of it, and that he never varied from that practice (page 48). Daggett also testified that he had no authority from the defendant company to sell these tickets. All the authority he ever had was from the general ticket agent of the Fitchburg road (pages 29, 30). Abbott, the general passenger agent of the defendant road, testified that the Fitchburg road was authorized to act as agents for the defendant company "in the issue of tickets" (page 36).

This is all the authority shown.

A principal is bound by the act of his agent no further than he authorizes the agent to bind him.

Parsons v. *Armor*, 3 Peters, 413–430.

The Fitchburg Company was authorized simply to issue this ticket, and of course to issue it as it was printed, and as the defendant company had agreed that it might be issued. There is no

express authority to change the terms of the ticket, and from the authority to issue it, the authority to make representations beyond its terms cannot be implied; still less the authority to make representations contradicting its terms. The ticket says, "No stop-over will be allowed hereon unless specially provided for by the local regulations of the lines over which it reads." That is the condition on which the Fitchburg Company was authorized to issue it. Can a clerk in the office of that company waive that condition? Can he bind the defendant, by representing that it amounts to nothing?

In an English case, where the jury found that the passenger was not informed of the terms of his ticket, the Court held that the whole ticket was the contract accepted by the plaintiff, and that he could not reject a condition which was one of its terms.

Burke v. *South Eastern Railway Co.*, 5 C. P. D. 1.

Or could the ticket seller say it was only needful to speak to the conductor without telling him what he should say? The presiding justice in this case says he may. He says: If the plaintiff's testimony in regard to what took place between himself and the ticket agent in Boston, and afterwards with the first conductor on the defendant's train, is true, then "whatever the rules and regulations of the road were, the plaintiff was rightfully a passenger on the train at the time of his expulsion, and the conductor had no right to put him off for not paying his fare, and the company was liable for the act of the conductor" (page 50). It seems to us that the error of this ruling, so far as it relates to the duties of conductors, is sufficiently shown by the regulation respecting tickets, found on page 38, — that "the privilege of stop-over will be granted only upon such forms of tickets and at such stations as the company shall designate." And as to the ticket seller at Boston, which, so far as concerns the defendant company, was the Fitchburg Company, and not its employee, — the extent of authoriy was to issue its ticket over its own road, with a coupon, among others, on our account over our road, for one first-class passage from Binghamton to Salamanca, upon the terms stated on the ticket.

Melville v. *Baltimore & Potomac R. R. Co.*, 2 Mackay (D. C.), 63.

It is a well-recognized principle as laid down in *Bast* v. *Bank*, 101 U. S. 93, that in the absence of fraud, evidence of a parol agreement made at the time of a written contract to form part of it is not admissible.

De Witt v. *Berry*, 134 U. S. 306.

A similar principle is stated in the cases where parol representations or agreements made at the time of subscribing for stock which are inconsistent with the terms of the subscription are inadmissible because inoperative and void.

Blodgett v. *Morrill*, 20 Vt. 509.
C. & P. Railroad v. *Bailey*, 24 Vt. 465.
Piscataqua Ferry v. *Jones*, 39 N. H. 491.

At the trial the defendant in error relied upon the authority of the case of *Murdock* v. *The Boston & Albany Railroad Company*, 137 Mass. 293. But that case is clearly distinguishable from this. In that case the defendant company controlled and operated the whole road covered by the ticket. It owned part of it, and managed the rest under a lease. The ticket seller was the undisputed agent of the company, and corroborated the plaintiff's testimony. He gave the plaintiff an assurance respecting the validity of the ticket, which the plaintiff relied on. The assurance related wholly to the company of which he was the agent, and not at all to any foreign company. There was no such connecting line of different companies, as in this. The Court say: "If the defendant's superintendent or president, or both of them, had been standing by when the plaintiff purchased his tickets, and had heard and assented to what was said by the ticket seller, and if they were under the same mistake as to the rules established for the guidance of conductors, the legal position of the plaintiff would hardly have been stronger than it is at present." The defendants, by their agent, sold the plaintiff a worthless ticket over their road, and upon inquiry by the plaintiff gave him positive assurance that it was good. He was their agent for that purpose. They did not question his authority. The transaction related wholly to their road. The action was originally in contract for the sale of a worthless ticket. It went to the full court

on an exception of defendant relating to the rule of damages, and the exception was sustained (133 Mass. 15). The writ was then amended by the substitution of the word "tort" for contract. The declaration was not changed.

But whatever authority the ticket seller may have had in that case to bind the company by which he was employed in the sale of its tickets generally, it seems to us plain that the seller of this ticket had no power to waive or vary the regulations of the defendant company, and it does matter what the regulations of this company were. The ticket says: "Agents will in no case extend the time on this ticket." Suppose the seller of this ticket had said to the plaintiff: "That does not matter." Would that statement have been binding on this defendant? It says: "When stamped by the company's agent, subject to the following contract." Suppose the same seller had said: "It is not a contract at all." It says: "In selling this ticket for passage over other lines this company acts only as agent, and assumes no responsibility beyond its own line, which extends from Boston to Greenfield only." Does that mean nothing? It says, as we have seen: "No stop-over will be allowed hereon unless specially provided for by the local regulations of the lines over which it reads." Of what avail is that to us if a person not in our employ and over whom we have no control can dispense with it without consulting us, and without notice to us? And if such seller may lawfully do it in one case, why not in every case; and how are we to know what rules we have for the government of conductors, or whether we have any? It says: "The coupon is not good if any alterations whatever are made herein." How could it affect us if this same seller had told the purchaser, "that made no difference," and the purchaser had altered the date of it? It says: "The coupons belonging to this ticket will not be received for passage if detached from the contract." Suppose the seller of this ticket had told the conductor it mattered not if he did detach them, and the plaintiff had handed a detached one to our conductor. What, by the regulations of the defendant company, was its conductor to do? And if he was bound to take the coupon, what force is there in the regulation? So far as respects the authority of the Fitchburg road to bind this company, it does not appear that this company has

given it any authority, except to sell tickets over its road with limitations and conditions printed on their face. It is quite different from the case of a sale of tickets by its own agent over its own road; in which case it may carry a passenger without any ticket.

Similarly, in *Lake Shore & M. S. R'y. Co.* v. *Pierce*, 47 Michigan, 277, the ticket agent's statement extended only to the road which employed him, and for which he had authority to act.

In *McClure* v. *Philadelphia W. & Baltimore Railroad*, 34 Md. 532, the Court held that the presumption is that a ticket agent at a way station has no authority to modify contracts between his company and through passengers.

A ticket agent has no implied power to bind a railroad company as a common carrier beyond the line of its own road.

Story on Agency, § 106, and note 3.
Burroughs v. *Norwich & W. R. Co.*, 100 Mass. 26.

In *West* v. *Albany & Susquehanna R. R.*, 5 Lansing, 475, the Court stated their opinion that the power in a railroad corporation to make a contract to carry beyond its line is coincident with the power to make contracts for transportation with other carriers, and is confined to the governing officers of the corporation, and that its subordinate agents do not possess that power unless it has been expressly conferred upon them, or has been so exercised as to have become the established course of business.

See also

Grover & B. Co. v. *M. P. Railroad*, 70 Mo. 672.
Phillips v. *N. C. Railroad*, 78 N. C. 294.
People v. *Chicago & Alton R. Co.*, 55 Ill. 95.
Wood on Railroads, § 461, note.

And under the authorities and for the reasons above stated, we submit that the eighth prayer for instructions should have been given.

II.

We submit here that substantially this case has been twice decided by this court; first in *Mosher* v. *St. Louis I. M. & S. Railway Co.*, 127 U. S. 390, and more recently in *Boylan* v. *Hot Springs R. Co.* 132 U. S. 146.

The defendant's prayers should have been given. The first was: The regulation of the defendant corporation — that the several conductors of its trains shall require of each passenger a valid ticket, or pay the established fare — is a necessary and proper regulation, and if the plaintiff in this case, having, as he says, taken defendant's train at Olean for Salamanca, did not, when thereto requested, present to the conductor a valid ticket, but only a ticket that had been cancelled, and refused to pay his fare, then the conductor had the lawful right to stop the train at an intermediate station, or near to a dwelling house, and put the plaintiff off the train, using only such force as was necessary for that purpose; and if, after being so put off, he offered to pay his fare, the conductor was not required to permit him to retake the train.

The second prayer similarly concerned the regulations of the road, their validity and effect. Both were vital to the case, were in conformity with the rule established in the two cases above referred to, decided in this court, and should, we submit, have been given. The established rules and regulations of the company for the guidance of conductors in respect of passengers were material to the issue. They were in evidence, admitted without objection. They furnished an explanation of the conduct of the conductor. It was the province of the Court to decide what force and effect they had. It was for the Court to say whether they were reasonable and proper, or otherwise.

Hibbard v. *N. Y. & Erie R. Co.*, 15 N. Y. 455.
Cheney v. *Boston & Maine R. R.*, 11 Met. 121.
Dietrich v. *Pennsylvania R. R.*, 71 Penn. 432.
State v. *Goold*, 53 Me. 279.
Baltimore C. P. Railway Co. v. *Wilkinson*, 30 Md. 224.

If reasonable and proper, the jury should have been so instructed; the defendant had a right to the benefit of such instruction. But instead of such instruction, the judge told the jury the question was whether the plaintiff's testimony was true in regard to what took place between himself and the ticket agent in Boston, and afterwards with the first conductor on the defendant's train; "and if the plaintiff, when he bought his ticket in Boston, informed the ticket agent

of his wish to stop over at the Olean station, and was then told by the ticket agent that he would have to speak to the conductor about that, and between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean, and the conductor, instead of giving the plaintiff a stop-over check, punched the plaintiff's ticket, and told him that was sufficient to give him a right to stop over at Olean, and afterwards to use the punched ticket between Olean and Salamanca, then, whatever the rules and regulations of the road were, the plaintiff was rightfully a passenger on the train at the time of his expulsion, and the conductor had no right to put him off for not paying his fare, and the company was liable for the act of the conductor; that if, on the other hand, he did not notify the conductor of his wish to stop over at Olean, and received no such assurance from the conductor or from the ticket agent, as he has testified, then the punched ticket gave him no right to ride as a passenger on the train between Olean and Salamanca without paying his fare, and if he refused to pay the fare when demanded, the conductor was justified in putting him off, and his offer to pay his fare after the train was stopped was too late, and did not give him a right to ride on the train, and the conductor was justified in expelling him, notwithstanding the offer" (pages 50, 51).

These instructions, we submit, were erroneous, and the error was grave. The Court will notice that our exceptions relate not only to the refusal of the judge to instruct as prayed, but to the instructions he gave; not only as to what he should have said to the jury, but to what he said instead (page 51). It was, of course, the province of the jury, and not the right of the judge, to find what the evidence was. That was what the jury was there to do. And this is true not only as respects the statements of witnesses, but in respect of the proper inferences of fact from such statements. But instead of leaving the jury to find and interpret the testimony, the presiding judge undertook to tell them what the testimony was, and did not state it as it was, but greatly to the prejudice of the defendant. The truth is there was no evidence that the first conductor told the plaintiff when he punched his ticket that was sufficient to give him the right to stop over at Olean. All the evidence is reported just as it was given; and the Court will

look in vain to find any such testimony: it is not there; but the judge gave the jury to understand that such was the testimony. It is true, it is so alleged in the declaration, but there is no such evidence in the case, nor is that the natural inference from what the plaintiff did testify. The testimony is (page 25): "He took my ticket in his hand, and while he had it punching it, I said, 'Conductor, I want to stop off at Olean'; and I said, 'Will we catch the train which left Buffalo this morning at eight o'clock, and which ought to intersect this one; will we get it so I can get to a place called Portville this morning? As we are late, I thought I would ask you the question.' He said, 'Yes, we will; that train gets Southern passengers from this train, and waits for us if we are late.' I said, 'I want to get off there'; and he said, 'I will fix you all right;' the ticket then in his hand; he gave me the ticket with the coupon on it then punched.' To the question, Was anything further said at that time? he answered, 'I don't think there was.' To the question, Did you have any further conversation with him before arriving at Olean? He answered, 'Yes, sir; once or twice he came and looked at the ticket, or two or three times after that, and I asked him if he was sure we would make that connection, as we were late,' and he said, 'I told you before, we would make the connection all right, as it waits for us, and takes Southern passengers from us." And being asked if that was substantially all that passed between him and the conductor before he got to Olean, he said it was. Of course, here is no such statement as the judge mentions. The punch indicated that the ticket had been used, and not that the passenger might stop over. This is too plain for argument. The same conductor testified that invariably when a passenger was entitled to stop over, and said he wanted to stop over, he gave him a stop-over check, and that he invariably had these stop-over checks with him. All this the judge overlooked, and instead instructed the jury in substance that, whether the ticket was cancelled or apparently fair on its face, as in *Hufford* v. *Grand Rapids R. Co.*, 53 Mich. 118, or whether the plaintiff was guilty of any negligence in not procuring a stop-over check, as in *Murdock* v. *Albany R. R.*, 137 Mass. 293, it made no difference, if the first conductor told him the punched ticket was sufficient.

The Court has but to consult the record, and it will see there is no such testimony in the case. And its absurdity is manifest in the fact that such a thing would have been in direct violation of the rule, then for years in force, which provided that a stop-over check should be given; and all this for no possible motive moving the conductor so to act, and in direct conflict with the plaintiff's testimony that the conductor said "I will fix you all right," and not that he had done so. There is no testimony in the case whatever that he "told the plaintiff that was sufficient." At most, according to the plaintiff's statement, the conductor was negligent, whereas the judge makes him guilty of a falsehood, and a malicious act, which he well knew was in violation of the established rules, and would certainly involve the passenger, and might involve himself also, in trouble, and all without motive. If, in the light of the testimony, one asks what the conductor meant when he said "I will fix you all right," the natural answer is he meant what he said, — not that he had already fixed the plaintiff all right, but that he would do so. If one asks how? the answer is, by doing what the rules of the company required him to do. Doubtless, if he said he would fix him all right, he meant he would give him a stop-over check. There was no other thing to do. If he neglected this, it was an instance of inattention, but not a tortious act; and this is both natural, and conformable to what he said. But the judge mistook his testimony for a falsehood, and gave the jury that impression. The plaintiff, in his anxiety to catch the intersecting train, doubtless forgot to call for his stop-over check (page 29). The judge mistook what the conductor said, and so misstated it, and thereby led the jury to the absurd conclusion that the conductor meant what he did not say, and deliberately violated an express rule of the road, well known to him, and a matter of every day's practice, without any possible motive for so doing. If it be said that this mistake of the judge was proper cause for a motion for a new trial, the answer is: But it is also the law that conclusions of fact are for the jury.

In the second place, these instructions are in conflict with the right secured to the defendant corporation by the law of the State under which it was created, and in which it exists and is operated, and where the act complained of was done. They annul and set

aside the regulations of the company, authorized and expressly provided for by the laws of the State of New York, framed with great care, in the interest of stockholders, officers and employees, and of passengers as well; needful to the safety, protection and comfort of all; corresponding to those provided for by legislative enactments in nearly all the States; sanctioned as reasonable and proper by the highest judicial tribunals in the land, and necessary to the existence of the defendant company; and in effect, substitute only in place and in despite of them, the law of physical force, with its consequent confusion and contention. The instructions assume authority in subordinate agents and servants, which neither the law nor the corporation ever gave nor intended to confer, and which the subordinates themselves never claimed nor pretended to have. They necessitate a new test for the appointment of conductors. The question in such appointment will no longer be: Is the applicant honest, intelligent, of obliging disposition and agreeable manners, but is he loud-voiced? can he wrangle? is he an athlete? and can he clear the car of roughs?

To quote the Court in *Lake Shore & M. S. Railroad Company* v. *Pierce*, 47 Mich. 282: "Every one is bound to know that the conductor is not invested with general power to run his train as he pleases." This was a case where the ticket agent had told the plaintiff that the train would stop at a station where it did not stop; and the Court remarks that a passenger cannot compel a conductor to deviate from his appointed scheme.

The presiding judge mistakes the office of a conductor. He is in truth what his title implies, which is not true of all holders of titles. He conducts the train. He takes up the tickets and collects the fares, but he does not fix them. He can neither increase nor diminish them. He makes no bargains, and has no authority and no time to take evidence and decide disputed questions. He is not an umpire. He cares for the safety of the passengers. He directs the engineer and brakemen. He stops at prescribed places. The hours of his departure from one place and his arrival at the next are fixed. He does not make rules, but observes, interprets and administers the rules made by his superiors for his government in the conduct of the train. For the time being, his interpretation of the

rules is necessarily conclusive. He has not much time for deliberation, and he has no associates. If a passenger is aggrieved by his interpretation of the regulations, he must seek his remedy at some other time, in the proper tribunal. He cannot maintain his claim by force. It is difficult to see why a conductor acting in good faith in such case is not entitled to the protection of the law; and it has never been pretended that this conductor did not act in good faith. Yet the presiding judge places him in this dilemma: If you do not observe the regulations of your company, but yield to the importunities of passengers, and violate the rules, you will be dismissed, and the sureties on your bond will be sued for your unfaithfulness; if you are faithful, and observe those rules, you may be sued by a passenger for so doing, and the United States District Court for the District of Massachusetts may give judgment against you for ten thousand dollars, which is more than you can hope to pay. What wonder is it that in sustaining the third demurrer in Mosher's case, Judge Brewer asks: "Can it be that the railroad company is responsible because the conductor did that which by one of the reasonable rules of the company he was required to do?" (23 Fed. Rep. 326).

It is idle to say this case may be maintained against the company but not against the conductor. The second count is for an assault, and in an action against him he cannot plead that he made it by order of the company. Both counts are for the same cause. An action for an assault might be maintained against both or either. The case of *Baker* v. *Coffin*, hereinafter cited, was against the conductor. Does the law mean that a conductor shall live, while he is a conductor, in apprehension of such misery? "See," said the great Thomas à Kempis, "this world is full of crosses!" And multitudes in misery, or in apprehension of misery, answered: "It is true." "Then," said the comforter, "hope in a better"; and then the multitude dried their tears.

It does indeed seem strange that a conductor of a train at the Alleghany station in New York, who does only what was right, and which he was bound to do, is to be held responsible for the acts of a ticket seller in Boston, of whom he knew nothing, and of a prior conductor at Olean, with whom he had no correspondence,

over whom he had no control, and of whose acts he had no knowledge. The theory that the sins of fathers may be visited upon their children we believe is limited to some three or four generations, but no such relationship existed between the conductor and the ticket seller, or the other conductor. One may be curious to see a proper declaration against this conductor for what the ticket seller or the prior conductor did, but we have no leisure to frame one. Let it suffice there is none such against the company in this case.

III.

The remaining prayers were framed in contemplation of the adjudicated cases, and the instructions therein requested should have been given. The refusal to give them is assigned as error (pages 52–53), after exception to the rulings and instructions given to the jury, and such assignment is now insisted upon.

In the last prayer (page 50), after the plaintiff had conceded that no more force was used in putting the plaintiff off the train than was necessary, the Court was requested by the defendant to rule that the plaintiff could not recover for an injury which he voluntarily brought upon himself. This instruction the Court declined to give. The error is assigned on page 53. This, it seems to us, ought to be, and, we submit, is the law. No unnecessary force having been used, it follows that the plaintiff's injury must have resulted from his own resistance. In *Coleman* v. *New York & New Haven R. R. Co.*, 106 Mass. 167, the Court say: "Violence on his part would increase the violence necessary and proper to be used on their part; and if it contributed in any degree to the violence of his fall or the aggravation of his disease he cannot recover for the injuries he received."

See *Hall* v. *Memphis & C. R. R.*, 15 Fed. Rep. 57; *Townsend* v. *N. Y. Central R. R.*, 56 N. Y. 301; *Chicago, B. & Q. R. R.* v. *Griffin*, 68 Ill. 499.

It cannot be said of the plaintiff that he was ignorant, and incapable of understanding the stipulations of his ticket. He says otherwise. He was a carpenter and an inventor; a deviser of something not known before; a discoverer, and, besides, a machinist. He says he paid in the year 1881 a thousand dollars for car fare. However

the truth of this may be, the plaintiff was intelligent. He knew what his ticket said; though, perhaps, it does not matter if he did not. He was bound to know (*Johnson* v. *Concord Railway*, 46 N. H. 213). The case is unlike that of an assault where one apprehending bodily harm defends himself by force. Here no bodily harm was apprehended; nothing of that sort was contemplated or expected or feared. The fare demanded was the regular fare, some sixty cents. The conductor made no threat. He simply stated the rule, and how it was to be enforced if not complied with. The order to enforce was part of the rule itself. The conductor invited no violence; the plaintiff does not pretend that the conductor made any reply when the plaintiff told him he could not put him off. So far from accepting the plaintiff's challenge, he said nothing; went on and collected his other tickets, gave the plaintiff time to reflect, came back and took his answer, and then proceeded to execute the regulation of the company. The plaintiff knew that the rules of the corporation were inflexible. As a man of experience, he knew the conductor had no alternative but to require a valid ticket or the fare; the conductor told him so. He knew it was not this conductor's concern to inquire into the mistakes, if there were any, of the first conductor, and it is settled that if the conductor, had made such inquiry and found that there was a mistake he had no power and no right to correct it; neither was it his place to inquire.

The case of *Wakefield* v. *South Boston Railway Company*, 117 Mass. 544, was for an assault and battery in putting the plaintiff off its car for non-payment of the fare demanded. The plaintiff had a commutation ticket, which he gave to the first conductor, and claimed that the first conductor told him he could ride on that car without paying another fare. The Court say: "The conductor of that car, whose duty it was to collect the fare, had no authority to give the passenger a free passage upon his statement that the conductor of another car had promised it to him without any consideration. Conductors have no authority so to bind the corporation by which they are employed. This decision was in 1875. It is a case of very high authority. The late Mr. Justice Pitman presided at the trial in the Superior Court. The justices who heard the case in the Supreme Court were: Mr. Chief Justice Gray, with associate justices Wells,

Colt, Ames and Devens. Mr. Justice Colt gave the opinion. The case is in point.

If the first conductor had failed of his duty to the plaintiff the plaintiff's remedy was clear, and he knew it. But instead of observing the regulations of the company, as he had agreed to do when he purchased his ticket, — instead of waiting and seeking his remedy in a lawful way, he determined to fight it out. He voluntarily and wilfully engaged in a scuffle, in which, as he testified, he foresaw he would be overcome, and now asks the defendant company to pay him damages for the injury he claims he sustained in his own voluntary duel; and, under the instructions of which we here complain, the jury awarded him ten thousand dollars damages.

It is related that two men once sought the hand of a lady. It was of course, the lady's right to decide the question of preference, but, strangely enough, she was indifferent, and was ready to accept either, as the two might agree. They agreed to decide the question by a duel, the victor to have the lady. They fought with pistols, in which fight one lost a leg and the other an arm. The one who lost an arm was deemed to be the victor, because he stood over his opponent as the latter lay prostrate. He took the lady. After the marriage, the one who lost a leg sued the other, — not for the loss of the lady, but for the loss of his leg. The judge who heard the case said: "If I were holding a criminal court, I should send you both to the house of correction, at least until your wounds healed, but in this civil case for damages neither can have any aid from me."

How much stronger is the case when the plaintiff is the sole cause of his injuries.

If it be said the presiding judge gave further instructions on the subject of damages, which were not objected to, the answer is: It is true that they were unobjectionable except so far as contrary to the instructions asked; but he did not instruct as asked, — that the plaintiff was not entitled to damages for injuries caused by his own wrongful act, — nor present to the jury the distinctions set forth in the ninth assignment of error.

We cite: *Mosher* v. *St. Louis Iron Mountain and Southern Railway Co.*, 127 U. S. 390; *Boylan* v. *Hot Springs Railroad*, 132 U. S. 146; *Townsend* v. *New York Central Railroad*, 56 N. Y. 295; *Shelton* v. *Lake Shore & M. S. Railway*, 29 Ohio St. 214; *Brad-*

shaw v. *South Boston Railroad*, 135 Mass. 407; *Frederick* v. *Marquette, etc., Railroad*, 37 Mich. 342; *Petrie* v. *Pennsylvania Railroad*, 13 Vroom, 449; *Pennington* v. *Philadelphia & Wilmington Railroad*, 62 Maryland, 95; *Rawitzky* v. *Louisville & Nashville Railroad*, 40 La. Ann. 47; *Louisville & Nashville Railroad* v. *Fleming*, 14 Lea. (Tenn.) 128; *Churchill* v. *Chicago & Alton Railroad*, 67 Ill. 390; *Chicago, Burlington & Q. R. R.* v. *Griffin*, 68 Ill. 499; *Baker* v. *Coffin*, 31 Barb. 556.

In the first of these cases, the plaintiff's complaint was that the company had no agent at the place appointed, to enable plaintiff to conform to his contract for carriage. But this Court held that the conductor had no authority to waive any condition of the contract, or to dispense with the want of a stamp, or to inquire into the previous circumstances, or to permit the plaintiff to travel on the train. In delivering the opinion sustaining the demurrer in the first instance, the district judge, Treat, says: "It is evident that the plaintiff cannot recover on the contract, because he had failed to comply with its terms; and he cannot recover for the alleged trespass, because the conductor rightfully expelled him from the cars for failure to present a proper ticket" (17 Fed. Rep. 880); and we have already quoted the observation of Judge Brewer in sustaining the third demurrer. See also, 6 Am. and Eng. Railroad cases, 322, and notes.

In Boylan's case there was a mistake, or failure to have the ticket stamped at Hot Springs. Bradshaw's case arose, like the case at bar, from a mistake of a prior conductor. The first conductor gave the passenger the wrong check. As in this case, no unnecessary force was used. The Court says: The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car, or even to decide upon the verbal statement of others as to the fact. If the company has agreed to furnish the passenger with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield for the time being to the reasonable practice and requirements of the company, and enforce his right in a more appropriate way.

In *Petrie* v. *Pennsylvania Railroad Company*, an action of tort for expulsion from a train, the plaintiff, as in this case, stopped over at an intermediate place, and when he took a subsequent train told the conductor the prior conductor had given him the privilege, and in attestation thereof had put his initials upon the ticket. But the Court held that the conductor had no authority to modify the signification of the ticket. Reasley, Chief Justice, with Justices Depue, Van Syckel and Knapp, sat in the case.

Pennington v. *The Philadelphia, Wilmington & Baltimore R. R. Co.* was also a case of expulsion. The time named on the face of the ticket for which it was good had expired. But the plaintiff claimed that he was told by the agent when he bought the ticket that it was good until used.

Churchill v. *The Chicago & Alton R. R. Co.* is also a case of expulsion. The same rule is upheld.

Rawitsky v. *Louisville & Nashville R. R. Co.* is for expulsion on an expired ticket. The Court say he must be "held responsible for all the troubles which befell him on the occasion which is the subject-matter of this litigation."

Townsend v. *New York Cent. & H. River R. R. Co.* is a very fully-considered case. The plaintiff had a ticket from Sing Sing to Rhinebeck. After the train passed Peekskill the conductor called for the tickets, and the plaintiff handed his to him, which he took and retained, giving the plaintiff no check or other evidence of a right to a passage. As in this case, the plaintiff probably did not ask for a stop-over check, so in that case, the plaintiff omitted to ask for a return of his ticket. The plaintiff left the train at Poughkeepsie, and took a later train from there to Rhinebeck. The conductor called for his ticket, but he had none. He told the conductor he left it with the first conductor. Some of the other passengers confirmed his statement. The conductor told him he must pay his fare, which the plaintiff refused to do. Upon the arrival at the next station the conductor stopped the train and put him off. For this act the passenger brought his action. The Court say the conductor was right. It must be kept in view that the action was not for the act of the first conductor for wrongfully taking his ticket, but for the injury done him by the second conductor for putting him off the train.

The case of *Shelton* v. *The Lake Shore & Michigan Southern Railway Company* was three times tried; first, before the Court of Common Pleas, second, before the District Court, and afterwards, before the Supreme Court of Ohio; and always decided the same way. The injury was in being put off the train. The plaintiff claimed that his ticket had been wrongfully taken from him by a prior conductor. The Court held that the second conductor was right in putting him off.

Frederick v. *Marquette, Houghton & Ontonagon Railroad Company* was an action on the case by a passenger for being unlawfully put off the train. The evidence tended to show that the plaintiff went to the ticket office, asked for a ticket to Marquette, presented to the seller a one-dollar bill, and received a ticket and some change. He did not count his change nor notice his ticket. He took the train bound for Marquette the next morning. After the train left the station, the conductor took up the ticket, gave him no check, but indicated that the ticket was only for Morgan, and when the train reached Morgan, the conductor told him he must get off there, or pay thirty-five cents more fare if he wanted to go to Marquette. The plaintiff insisted he had paid his fare, and refused to pay more. The conductor put him off the train. The gist of the action was for the expulsion from the cars by the conductor. The Court say: "An erroneous impression seems to prevail with many, that where the conductor of a passenger train ejects therefrom a passenger who has paid his fare to a point beyond, but has lost or mislaid his ticket, or whose ticket does not entitle him to proceed farther, upon that train, that the company is liable in an action at law for all damages which the party may in any way have sustained in consequence of the delay, mortification, injury to his health, or otherwise, and that the passenger is under no obligation to prevent or lessen the damages by payment of the necessary additional fare to entitle him to complete his journey without interruption. How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways: one, the evidence afforded by the ticket; the other, the statement by the passenger contradicted by the ticket. Which should govern? As between the conductor and passenger, as to the right of the latter to travel,

the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims."

Chicago, Burlington & Q. R. R. Co. v. *Griffin* is also in point. The Court say: "The conductor must necessarily have the supervision and control of the train, otherwise there would be no protection to the lives and comfort of the public travel. A passenger who deems himself wronged should submit for the time being, and redress his grievances, whatever they may be, by a civil action. A party will be entitled to quite as much damage for any wrong or injury quietly endured as if violently resisted; indeed, the policy of the law ought to be to award him a higher measure of damages. Whatever personal injuries may result from his violence should be attributed to his own want of subordination.

Baker v. *Coffin* was an action by a passenger against the conductor for an assault in putting the plaintiff off the cars. His ticket was limited to three days. When he presented it to the conductor the latter told him the time had expired, which was true, and that he must pay his fare, which he refused to do. The conductor put him off, using no more force than was necessary. This was in conformity to the regulations of the New York Central Railroad Company. At the trial the Court directed a verdict for the defendant, to which the plaintiff excepted, and moved for a new trial. The Supreme Court held that the conductor was right, and denied the motion.

In *Hufford* v. *Grand Rapids & Indiana Railway Company*, 53 Mich. 118, the action was against the company, whose agent at Manton, on the defendant's road, told the plaintiff, as he testified, that the ticket was good. The ticket agent denied this; and the disputed question at the trial was whether the ticket was fair upon its face, or showed a former use by cancellation. The Court say: "If the plaintiff found the ticket he held was not good by reason of a former use and cancellment, he should have paid his fare when it was demanded, and looked afterward to the railroad company for the refunding of the money and for compensation for any trouble he might be put to in obtaining it." The question was whether or not the ticket was punched, and therefore not apparently good on its face.

We stop here. We may have fatigued the Court, but we have not exhausted the list of decided cases. Our proposition for the law of this case is that every passenger railroad company must necessarily have regulations, and in the sale of a ticket the obligation that the passenger shall conform to the regulations of the road over which he is to pass is implied, if not expressed, on the face of the ticket. In this case it is so expressed. If the law were otherwise the regulations would be of no use.

We claim that in the trial of causes, when nothing to the contrary appears, the law presumes that a witness means what he says, and not what he does not say, and that what he says and the inference of fact from what he says are for the jury, and not for the Court. We claim to have shown in this case that the defendant corporation was authorized to make regulations for the government of its conductors, and that it did make such, and that they were reasonable, and meant what they said, and were made to be observed, and that no authority to waive or alter them ever vested in a mere ticket seller for a connecting road; and that when a passenger refused to pay his fare, either in money or a valid ticket, the conductor had the right to put him off the train at a station, using no unnecessary force in so doing. We claim that the conductor of a train is intended to be, and necessarily is, under the regulations, the sole and exclusive judge of the validity of the ticket presented by the passenger, and in the event that he errs in his determination it is nevertheless the duty of the passenger to submit for the time being, and pay his fare, and seek his remedy in another form, and not seek to maintain his seat, in opposition to the conductor, by force; that if his violence results in physical injury, or contributes thereto, he cannot recover damages therefor. The plaintiff presented only a ticket that had been visibly cancelled, which, by the regulations of the company, was not good, and which the conductor was forbidden to take. The conductor simply did his duty, and is to be commended and upheld. He could do no less and no otherwise.

SETH J. THOMAS,
CALVIN P. SAMPSON,
of Counsel.

FILED.
DEC 14 1891
JAMES H. MCKENNEY.
CLERK

BRIEF FOR DEFENDANT IN ERROR.

143 - 60.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 169.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY

(OTHERWISE CALLED THE ERIE RAILROAD COMPANY)

v.

DAVID T. WINTER'S ADMINISTRATOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 169.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY (OTHERWISE CALLED THE ERIE RAILROAD COMPANY)

v.

DAVID T. WINTER'S ADMINISTRATOR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF EVIDENCE.

There was no conflict of testimony as to the following facts:—

That the Fitchburg Railroad Company of Massachusetts was, in 1882, authorized to act as agent for the New York, Lake Erie and Western Railroad Company in the issue of tickets for passage over the line of the latter company; that the defendant's intestate, Winter, on Feb. 13, 1882, at the ticket office of said Fitchburg Company in Boston, Mass., purchased an unlimited coupon ticket from Boston to Chicago, one of its coupons being for travel over the line of the Erie Company from Binghamton to Salamanca in the State of New York; that this was a ticket which gave to the purchaser the right of stopping over at certain stations on the lines of the various companies upon whose account it had been sold; that Olean, New York, was a station designated by said Erie Company as one at which passengers could stop

over; that upon this ticket on Feb. 14, 1882, said intestate, Winter, was carried by said Erie Company over its line as far as Olean; that he stopped over at Olean for several hours and upon resuming his journey upon the next westward bound through train of the Erie Company presented this same ticket; that passage was refused to him and extra fare demanded, and upon his refusal to pay this extra fare he was forcibly ejected from the train.

There was also evidence [see pages 22 to 28 of record] tending to show that when said intestate, Winter, purchased this ticket he was assured by the ticket seller that upon it he could stop over at Olean by speaking to the conductor in regard to it; that there was nothing upon the face of the ticket inconsistent with this assurance; that on Feb. 14, 1882, while upon a train of the Erie Company he did speak to the conductor, and told him of his desire to stop over at Olean; that this was timely notice to the conductor of what this passenger proposed to do; that said conductor then said to him, "I will fix you all right"; that at the time of this conversation said conductor punched the ticket and returned it to Winter, and told him upon what later train he could resume his journey from Olean to Salamanca; that subsequently on several occasions this same conductor when passing through the train again examined the ticket; that no notice was given to Winter by said company, or by anyone, that he, Winter, was not so complying with the regulations of said company as to be able to stop at Olean and to resume his journey upon the Erie Company's trains without presenting any other ticket or paying additional fares.

Evidence was also presented that the conductor who ejected Winter from the second train knew that he had been on the previous train, and did not suppose that he had been carried through to Salamanca; that said conductor supposed that the ticket presented by Winter was a "limited" ticket and so reported [see page 42 of record]; that a "limited" ticket gives no right of stopping over [see page 31], and

also that on a third train of said Erie Company on Feb. 15, 1882, Winter presented this same ticket which he had purchased in Boston, upon which he had been carried to Olean and which had been refused on the previous day, and that it was then accepted without question, and upon it he was carried from Olean to Salamanca and thence to Chicago. [See page 28.]

POINTS AND AUTHORITIES.

I.

The action has not been affected by the death of the defendant's intestate, Winter, since the entry of the writ of error in this court.

Rev. Stat. U. S. § 955.

> "When either of the parties whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States dies, before final judgment, the executor or administrator of such deceased party may, in case the cause of action survived by law, prosecute or defend any such suit to final judgment."

In determining whether "the cause of action survived by law" the rule of the common law is to govern, except so far as that rule has been modified by the laws of the State in which such action was brought.

Schreiber *v.* Sharpless, 110 U. S. 376.
Henshaw *v.* Miller, 17 How. 22.
Witters *v.* Foster, 26 Fed. Rep. 737.

This action was brought in Massachusetts, and as it is one of tort for damage to the person it would not survive by the rule of the common law. The statutory law of that State, however, provides that such an action shall survive.

Pub. Stat. of Mass., Chap. 165, § 1.

"In addition to the actions which survive by the common law, the following shall also survive: actions of replevin; of tort for assault, battery, imprisonment or other damage to the person. . . ."

See also Gen. Stat., Chap. 127, § 1; Acts of 1842, Chap. 89, § 1.

Kearney *v.* Boston & Worcester R. R. Co., 9 Cush. 108.

Hollenbeck *v.* Berkshire R. R. Co., 9 Cush. 478.

Bancroft *v.* Boston & Worcester R. R. Co., 11 Allen, 34.

As the cause of action survived, the defence of the suit may be assumed by the administrator of the original defendant in error, and his voluntary appearance for that purpose, which has taken place, is all that is necessary to enable the Court to hear and decide the appeal.

Rules of the Supreme Court of the United States, Rule 15.

II.

The exceptions taken in the Circuit Court relate only to the instructions of the Court to the jury in regard to the liability of the Erie Company upon the evidence presented, and to the admission of certain testimony.

No exception was taken to the instructions given in regard to the measure of damages.

The only questions before this Court are therefore as to the correctness of the instructions given and of the admission of that testimony.

The chief points of exception (and the only grounds of error mentioned in the assignment of errors) were to the instructions given and to the refusal of the Court to give the instructions asked on behalf of the company.

"Where instructions are asked in the aggregate, and there is anything exceptionable in either of them, the whole may be properly rejected by the Court. It is the

settled law of this Court that if the charge given by the Court below covers the entire case and submits it properly to the jury, such Court may refuse to instruct further."

Indianapolis & St. Louis R. R. Co. *v.* Horst, 93 U. S. 291.

A.

The instructions given covered the entire case and submitted it properly to the jury.

The Court instructed the jury, in substance, that if they believed the evidence of the defendant's intestate, Winter, the company was liable; that if he had received the assurances which he testified were given to him by the ticket seller and the conductor, then he was rightfully upon the company's train and the company was liable for the act of the conductor in putting him off for not paying his fare, whatever the rules and regulations of the road were. [See page 20 of record.]

It appeared from the evidence introduced by the plaintiff below, if the jury believed it, that the ticket seller told Winter that the ticket would permit him to stop over at Olean and resume his journey upon another train by speaking to the conductor, with a full understanding of what the ticket was and of what Winter wanted to do, and sold the ticket to Winter as good for his contemplated purpose. There was no notice to the contrary on the face of the ticket, and Winter took and paid for it on the strength of this assurance. So, too, it appeared that when Winter presented his ticket to the first conductor on the defendant's road, and explained to him that he wanted to stop over at Olean and resume his journey by another train, and the conductor, saying he would fix him all right, punched the ticket and returned it to him, the conductor was acting with a full understanding of what the ticket was and of what Winter wanted to do. There was no mistake on the part either of

the ticket seller or of the conductor as to the terms and character of the ticket, or as to Winter's desire to stop at Olean and resume his journey by another train. And the ticket seller, being the authorized agent of the defendant to make for it contracts for carriage of passengers, agreed with Winter that for a certain sum then paid by Winter he should be carried as a passenger over that part of the defendant's road lying between Binghamton and Salamanca, with the right to stop at Olean and resume his journey by another train without payment of additional fare, upon the simple condition of speaking to the conductor; and delivered to him the ticket as evidence of this contract.

Winter complied with the condition of speaking to the conductor, and there was no notice to him from either ticket or conductor that the ticket did not secure him the rights for which he had thus contracted with the defendant through its ticket seller.

The jury by its verdict found that the facts of the case were in accordance with the testimony of the plaintiff below, and the question of law is as to the liability of the company thereon.

Instructions of the authorized agents of a railroad company within the scope of their authority and in the line of their duty, given to a passenger in regard to his rights under a ticket sold by that company for his transportation over its line, operate as a waiver by that company of its rules and regulations so far as they are inconsistent with such instructions, if the ticket by its terms gives him no notice in conflict with such instructions.

When a passenger, in reliance upon assurances given to him by a ticket seller and by a conductor of a company to the effect that upon a certain ticket he may stop in his journey at a certain station, stops at that station, his ticket giving him no notice inconsistent with such assurances;— after such a stop, he is entitled to be carried the remainder of the journey for which the ticket provides without paying

extra fare or presenting any evidence of his rights other than his ticket, notwithstanding the fact that the rules of the company for the conduct of its conductors required them either to give stop-over checks to passengers who desired to stop over or to arrange for it in some other way, and the conductor had disregarded such rules.

Under such circumstances the company is liable for ejecting him from its cars upon his refusal to pay fare, although the conductor who so expelled him may have acted according to his instructions.

Murdock *v.* Boston & Albany R. R. Co., 137 Mass. 293 (1884).

Burnham *v.* Grand Trunk R. R. Co., 63 Me. 298 (1873).

Philadelphia R. R. Co. *v.* Rice, 64 Md. 63 (1885).

Young *v.* Pennsylvania R. R. Co., 115 Penn St. 112 (1886).

Pennsylvania R. R. Co. *v.* Spicker, 105 Penn St. 142 (1884).

Toledo, Wabash & Western R. R. Co. *v.* McDonough, 53 Ind. 289 (1876).

Hufford *v.* Grand Rapids R. R. Co., 64 Mich. 631 (1887).

Palmer *v.* Charlotte, Columbia & Atlanta R. R. Co., 3 Rich. (S. C.) n. s. 580 (1870).

Charleston & Savannah R. R Co. *v.* Brauss, 70 Ga. 368 (1883).

Hamilton *v.* Third Avenue R. R. Co., 53 N. Y. 281 (1882).

Tarbell *v.* Northern Central R. R. Co., 24 Hun, 51 (1881).

Fell *v.* Northern Pacific R. R. Co., 44 Fed. Rep. 248 (1890).

McGee *v.* Missouri Pacific R. R. Co., 92 Mo. 208 (1887).

And in numerous cases where the passengers, although not acting under assurances or directions given to them by the agents of the companies, were not at fault, but, through the mistakes or neglect of duty of the companies' agents, had

not been supplied with the proper evidence of their rights, — the liability of the companies for ejecting passengers upon refusal to pay extra fare has been established.

These cases may be classified as follows: —

(1.) The passengers upon return trips presented coupons which should have been used for the outward journeys, the first conductors having by mistake taken up the return coupons.

Pennsylvania R. R. Co. *v.* Bray, 125 Ind. 229.

Lake Erie & Western R. R. Co. *v.* Fix, 88 Ind. 381.

Kansas City, Memphis & Birmingham, R. R. Co. *v.* Riley, S. C. Miss. June 1, 1891, 9 So. Rep. 443.

(2.) The passenger had received a "trip check" instead of a return coupon; or a "trip check" instead of a "stop over" check.

Baltimore R. R. Co. *v.* Bambrey, 2 Monaghan (S. C. Penn.) 109.

Yorton *v.* Milwaukee, Lake Shore & Western R. R. Co., 62 Wis. 367.

(3.) The conductors had taken the tickets, but demanded them again.

Louisville, New Albany & Chicago R. R. Co. *v.* Wolfe, S. C. Ind., May 23, 1891, 27 N. E. Rep. 606.

Pittsburg R. R. Co. *v.* Hennigh, 39 Ind. 509.

Georgia R. R. Co. *v.* Eskew, S. C. Ga., Feb. 23, 1891, 12 S. E. Rep. 1061.

(4.) The passengers had not received the tickets they intended to buy and for which they had paid; or because of misdirection of the company's agents were on the wrong trains.

St. Louis, Arkansas & Texas R. R. Co. *v.* Mackie, 71 Tex. 491.

Georgia R. R. Co. *v.* Olds, 77 Ga. 673.

Alabama Southern R. R. Co. *v.* Heddleston, 82 Ala. 218.

See also,

Carpenter *v.* Washington & Georgetown R. R. Co. 121 U. S. 474 (1886).

Johnson *v.* Northern Pacific R. R. Co., 46 Fed. Rep. 347 (1891).

(5.) The passengers could not procure tickets, and refused to pay more than the ticket fare.

Illinois Central R. R. Co. *v.* Johnston, 67 Ill. 312.

Chicago & Alton R. R. Co. *v.* Flagg, 43 Ill. 364.

Jeffersonville R. R. Co. *v.* Rogers, 38 Ind. 116.

(6.) After payment of fare it was again demanded.

English *v.* Delaware & Hud. Riv. R.R. Co., 66 N.Y. 454.

(7.) Conditions of the ticket requiring it to be signed by the passenger and stamped by an agent had not been complied with, owing to the fault of the agent.

Head *v.* Georgia Pacific R. R. Co., 79 Ga. 358.

And also in certain cases where, although not apparent what the fault of the company was, it was held that the ticket should have been accepted, the passenger not being at fault.

(8.) Where no restriction of the ticket to particular trains, or against its transfer, appeared on its face, and the passenger had not received or been affected with notice of the same.

Maroney *v.* Old Colony R. R. Co., 106 Mass. 153.

Carsten *v.* Northern Pacific R. R. Co., 44 Minn. 454.

(9.) The passenger presented separated coupons, although they were marked "not good if detached."

Wightman *v.* Chicago & Northwestern R. R. Co., 73 Wis. 169.

(10.) The tickets were good upon their face, and gave the right to a passage.

Pennsylvania R. R. Co. *v.* Connell, 112 Ill. 292, s. c. 127 Ill. 419.

Southern Kansas R. R. Co. *v.* Rice, 38 Kans. 398.

Auerbach *v.* New York Centr. & Hud. Riv. R. R. Co., 89 N. Y. 281.

Ward *v.* New York Centr. & Hud. Riv. R. R. Co., 56 Hun, 268 (1890).

The decisions which have *denied* the liability of companies for expelling passengers upon refusal to pay extra fare are distinguishable in their circumstances from the case at bar, and have been those where the passengers were not entitled to use the tickets presented for the following reasons: —

(1.) The tickets contained conditions requiring stamping by the companies' agents, which had been assented to by the passenger by his signature upon the ticket, and such conditions had not been complied with through fault of the passenger.

Boylan *v.* Hot Springs R. R. Co., 132 U. S. 146. (1889).

Mosher *v.* St. Louis, Iron Mountain & Southern R. R. Co., 127 U. S. 390. (1888) s. c. in 17 Fed. Rep. 880 and 23 Fed. Rep. 326.

Gallina *v.* Hot Springs R. R. Co., 13 Fed. Rep. 116.

Edwards *v.* Lake Shore & Mich. So. R. R. Co., 81 Mich. 364.

(2.) The tickets were upon their face void by the expiration of the time to which they were expressly limited.

Hall *v.* Memphis & Charleston R. R. Co., 15 Fed. Rep. 57.

Sherman *v.* Chicago & Northwestern R.R.Co., 40 Ia. 45.

Pennington *v.* Phil. Wilmington & Balt. R. R. Co., 62 Md. 95.

Louisville & Nashville R. R. Co. *v.* Rawitsky, 40 La. Ann. 47.

Pennsylvania R. R. Co. *v.* Hine, 41 Ohio St. 126.

Shedd *v.* Troy & Boston R. R. Co., 40 Vt. 88.

Lillis *v.* St. Louis, Kansas City & Northern R. R. Co., 64 Mo. 464.

Churchill *v.* Chicago & Alton R. R. Co., 67 Ill. 390.

Elmore *v.* Sands, 54 N. Y. 512.

Hill *v.* Syracuse, Binghamton & N. Y. R. R. Co., 63 N. Y. 101.

(3.) The passenger did not produce any ticket or any evidence of his rights other than his own statements.

Skelton *v.* Lake Shore & Mich. South. R. R. Co., 29 Ohio St. 214.

Phil., Wilmington & Balt. R. R. Co. *v.* Larkin, 47 Md. 155.

Pennsylvania R. R. Co. *v.* Vandiver, 42 Penn. St. 365.

Downs *v.* New York & New Haven R. R. Co., 36 Conn. 287.

Southern Kansas R. R. Co. *v.* Hinsdale, 38 Kans. 507.

Jackson *v.* Second Avenue R. R. Co., 47 N. Y. 274.

Hibbard *v.* New York & Erie R. R. Co., 15 N. Y. 455.

Townsend *v.* New York Centr. & Hud. Riv. R. R. Co., 56 N. Y. 295.

(4.) The tickets were restrictive and gave no right o. stopping over; and the passenger had stopped over either when from the terms of his ticket he had notice that he could not do so, or when, having no such notice, he had given no notice to the conductor or had not in any other way arranged for resuming his journey after the stop.

Vankirk *v.* Pennsylvania R. R. Co., 76 Penn. St. 66.

Dietrich *v.* Pennsylvania R. R. Co., 71 Penn. St. 432.

Peabody *v.* Oregon River and Navigation Co., S. C. Or., June 24, 1891, 26 Pac. Rep. 1053.

Petrie *v.* Pennsylvania R. R. Co., 13 Vroom (N. J. Law) 449.

McClure *v.* Phil., Wilm. & Balt. R. R. Co., 34 Md. 532.

Johnson *v.* the same, 62 Md. 95.

Stone *v.* Chicago & Northwestern R. R. Co., 47 Ia. 82.

Oil Creek & Allegheny R. R. Co. *v.* Clark, 72 Penn. St. 231.

(5.) The tickets were wrong: were not for the passenger's destination; were not "apparently good."

Chicago, Burlington & Quincy R. R. Co. *v.* Griffin, 68 Ill. 499.

Frederick *v.* Marquette, Houghton & Ontonagon R. R. Co., 37 Mich. 342.

Bradshaw *v.* South Boston R. R. Co., 135 Mass. 407.

McKay *v.* Ohio River R. R. Co., S. C. West Va., June 25, 1890, 11 S. E. Rep. 737.

(6.) The passenger was held to notice that his ticket was restrictive to certain trains, either because of its terms or because of statements of agents or because it was his duty to ascertain and take a proper train.

Thorp *v.* Central R. R. Co., 61 Vt. 378.

Thomas *v.* Chicago & Grand Trunk R. R. Co., 72 Mich. 355.

Lake Shore & Mich. South. R. R. Co. *v.* Rosenweig, 113 Penn. St. 519.

(7.) The passengers had valid tickets, but had taken trains which did not go to the stations for which the tickets were issued, and it was held that passengers were bound to ascertain and take the right trains.

Lake Shore & Mich. South. R. R. Co. *v.* Pierce, 47 Mich. 342.

St. Louis & Kansas City R.R.Co. *v.* Marshall, 78 Mo. 601.

Chicago & Alton R. R. Co. *v.* Randolph, 53 Ill. 510.

Atchison, Topeka & Santa Fé R. R. Co. *v.* Gants, 38 Kans. 608.

Pittsburg, Cinn. & St. Louis R. R. Co. *v.* Nuzum, 60 Ind. 533.

(8.) The passenger *knew* his ticket was not good for the purpose for which he tendered it.

Coleman *v.* New York & New Haven R. R. Co., 106 Mass. 160.

Cheney *v.* Boston & Maine R.R.Co., 11 Met. (Mass.) 121.

Godfrey *v.* Ohio & Miss. R. R. Co., 116 Ind. 30.

B.

Of the instructions asked by the defendant below those that were not, in substance, included in the instructions given were rightly refused.

The Court instructed that the company was not liable unless the plaintiff, Winter, had received the assurances which he testified were given to him by the company's agents.

This instruction placed the liability of the company upon the single ground that what might otherwise have been required of him, was not in this case necessary because of the acts and statements of the agents of the company, and in effect conceded the company's claim in regard to stop-over checks and cancellation of tickets as a general rule. So far as related to any obligation shown by the evidence to have been binding upon Winter in regard to procuring a stop-over check, this instruction was more than liberal to the company.

1.

The instructions asked in regard to the duty of Winter to have procured a stop-over check were objectionable for the reasons: —

(1.) The evidence as to the rules of the company in regard to these stop-over checks, showed that such rules as existed were merely for the conduct of *conductors*, requiring them to supply such checks to passengers who desired and were entitled to have them. [Pages 33, 37, 38 and 39 of record.]

(2.) If there had been evidence that a rule of the company existed which required passengers to *procure* such checks, it was not operative in this case because: —

(*a*) It had been waived by the statements and acts of the company's agents.

(*b*) A rule which imposed upon passengers the obligation of *compelling* conductors to furnish such evidence of the passengers' rights would not be held to be reasonable. The duty should be upon the company to provide such checks, and not upon the passenger to procure them.

(*c*) Such a rule would have been inconsistent with the company's notice to passengers [page 38 of record], in which the company gives notice to passengers merely that they must give timely notice of their desire to stop over.

(*d*) In addition, the evidence of the acting assistant general passenger agent of the company showed [page 38 of record] that stop-over checks were only one of several ways for conductors to arrange for the stopping over of passengers.

(*e*) Furthermore, there was no evidence tending to show any notice to this passenger of the existence of such a rule, or that he was by implication affected with notice of the same.

2.

It was claimed on behalf of the company that, even if Winter had been rightfully upon the train and entitled to passage without payment of fare, yet his refusal to pay such fare, and to leave the train, and his resistance to expulsion, operated to relieve the company from liability, and that the Court should so have instructed.

The right to the passenger to refuse to pay fare or to leave the train and to resist expulsion is dependent upon his right to transportation on the train. If entitled to carriage he has a right to enforce that right and to resist infraction of that right, at least to the point of showing that he goes from the train under compulsion, by the use of force and not of his free will. If he has a right to travel on the train he cannot rightfully be put off.

The cases above cited where companies have been held

liable for ejecting passengers are all cases of refusal to pay the fares demanded and most of them are cases of forcible expulsion.

It is the settled rule of law that the passenger if in the right, need not acquiesce in the wrong, that he does not by assertion of his rights estop himself from holding the company liable for the wrong; that the mere act of putting off a train a passenger who is entitled to carriage is an unlawful interference with his rights and a tort to the passenger for which the company is liable.

The point taken by the company was expressly decided, adversely to its claim in

Brown *v.* Memphis & Charleston R. R. Co., 7 F. R. 51.

Louisville, N. A. & C. R. R. Co. *v.* Wolfe (S. C. Ind. 1891) 27 N. E. Rep. 606.

English *v.* Delaware & Hud. Riv. R. R. Co., 66 N. Y. 454.

Philadelphia R. R. Co. *v.* Rice, 64 Md. 63.

The limited number of cases holding that the action of the passenger affects the measure of damages are not relevant, the question of damages not being before this Court; but it is to be noticed that of these cases few go further than to hold that the passenger must confine his resistance within the point of not contributing to his injuries by an unnecessary trial of strength with superior force, and that such unreasonable or excessive resistance goes in mitigation of damages. There was no unreasonable or excessive resistance in the case at bar.

3.

It was also claimed on behalf of the company that as the expelling conductor merely did his duty and the action was for the wrong done by him, it could not be maintained, and that the Court should so have instructed.

The action is for the tort of the Erie Company to defendant's intestate.

The company cannot escape liability for its tort on the ground that the expelling conductor acted in good faith and did no more than his duty, if the cause of his action was the mistake or neglect of duty of another of its agents. If the company, because of the action of *any* of its agents, made an unlawful interference with the rights of this passenger, it is liable.

The point was urged but not adopted in many of the cases above cited; and expressly decided to the contrary in: —

Phil. Wilmington & Baltimore R. R. Co. *v.* Rice, 64 Md. 63.

Baltimore & Ohio R. R. Co. *v.* Bambrey, 2 Monaghan, 109.

Yorton *v.* Milwaukee, Lake Shore & West. R. R. Co. 62 Wis. 367.

St. Louis, Ark. & Tex. R. R. Co. *v.* Mackie, 71 Tex. 491.

And the point, if of any weight, is in point only as a question of pleading which is not here open.

Furthermore, the evidence showed that the expelling conductor acted from a mistaken belief as to the character of Winter's ticket; and a fair inference from his testimony was that he supposed Winter had stopped over on a ticket good only for a continuous passage.

The liability of the company is the same, under the circumstances of this case, as if the ticket had been sold at its own office.

Young *v.* Pennsylvania R. R. Co., 115 Penn. St. 112.

Pennsylvania R. R. Co. *v.* Connell, 112 Ill. 295.

Schopman *v.* Boston & Worcester R. R. Co., 9 Cush. 24.

III.

The only point of exception remaining to be considered is that as to the admission in evidence of the conversation between the defendant's intestate, Winter, and the ticket seller of the Fitchburg Company at its office in Boston.

A witness called by the company who testified [see pages 32 and 36 of record] that for the fifteen years prior to the trial, he had been the acting assistant general passenger agent of the New York, Lake Erie & Western Railroad Company, testified also that when he was in the employ of that company the Fitchburg Railroad Company was authorized to act as its agent in the issue of tickets; and one of the witnesses called by the plaintiff below, who testified that for thirty-three years he had been the ticket agent of the Fitchburg Company at its Boston station, also testified that for the ten or twelve years prior to the trial he had sold tickets over the New York, Lake Erie & Western Railroad Company's line as parts of tickets to points in the West, and during that time those tickets were always honored.

The authority of the ticket seller at Boston, to act as agent for the Erie Railroad Company in issuing tickets for passage over its line, was therefore proved beyond all question.

The conversation between Winter and this agent of the Erie Company was competent evidence, bearing not only upon the terms of the contract made by the Erie Company with Winter, but tending also to show what notice of any rules of said company Winter had received.

The ticket is not the entire contract. It is evidence of the contract actually made. The real contract is often made before the ticket is seen, and the passenger frequently pays his money wholly in reliance upon the statements of the ticket seller, and not upon the strength of the endorsements

on the ticket. The passenger takes the ticket not as expressing the contract but as proof of the contract actually made.

Burnham *v.* Grand Trunk R. R. Co., 63 Me. 298.

Statements made by an agent are competent evidence against his principal when they are a part of the transaction in which he is engaged by his principal at the time.

Evidence such as was objected to in this case was admitted in the following of the cases above cited.

Hall *v.* Memphis & Charleston R. R. Co., 15 F. R. 57.
Murdoch *v.* Boston & Albany R. R. Co., 137 Mass. 293.
Burnham *v.* Grand Trunk R. R. Co., 63 Me. 298.
Maroney *v.* Old Colony R. R. Co., 106 Mass. 153.

LEWIS S. DABNEY,
CLIFFORD BRIGHAM,
Counsel for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 151.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

AUGUSTUS S. WITTEN, WILLIAM M. PEERY, AND JAMES R. WITTEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED OCTOBER 4, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

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1 No. 135. THE UNITED STATES *vs.* AUGUSTUS S. WITTEN, WILLIAM M. PEERY, and James R. Witten. } Debt on warehouse bond.

Pleas before the hon. judge of the circuit court of the United States for the western district of Virginia, in the fourth circuit, sitting at Abingdon, in the circuit and district aforesaid, on Monday, the 18th day of July, A. D. 1887.

Be it remembered that heretofore, to wit, at rules for the month of May, A. D. 1887, in the clerk's office of the circuit court of the United States for the western district of Virginia, at Abingdon, came The United States, by their attorney for the western district of Virginia aforesaid, and filed their declaration against Augustus S. Witten, William M. Peery, and James R. Witten, who are citizens of the western district of Virginia aforesaid, which declaration, with the endorsements thereon, is in the words and figures following, to wit:

In the circuit court of the United States for the western district of Virginia, May rules, 1887.

2 The United States of America, plaintiffs, complain of Augustus S. Witten, Wm. M. Peery, & James R. Witten, defendants, who have been duly summoned, &c., of a plea that they render to the plaintiffs the sum of $261.90, which the defendants owe to and unjustly detain from the plaintiffs:

For that heretofore, to wit, on the 31st day of January, A. D. 1884, in the western district of Virginia, the said defendants, namely, the said Augustus S. Witten as principal, and the said Wm. M. Peery and James R. Witten as sureties, by their certain writing obligatory, sealed with their seals and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the just and full sum of $261.90, and for the payment thereof they bound themselves, their heirs, executors, and administrators, jointly and severally, firmly by their writing obligatory aforesaid; to which writing obligatory there was and is annexed a certain condition to the effect and purport following, to wit:

3 That if the above-bounden principal or either of them, or their heirs, executors, or administrators of either of them shall well and truly pay or cause to be paid unto the collector of internal revenue for the fourth collection district of Virginia the amount of taxes due and owing on the following-described distilled spirits, to wit:

Date, 1884.	No. barrels.	Wine gallons.	Proof gallons.	Taxable gallons.	Serial number of packages.
January 25	2	82.00	82.00	82.00	13 to
26	1	46.00	46.00	46.00	"
28	1	25.00	25.25	25.00	"
29	1	44.00	44.00	44.00	"
30	2	93.00	93.00	94.00	" 19
Total	7	290.00	290.25	291.00	

which were deposited during the month ended Jan'y 31st, 1884, and entered for deposit in the distillery warehouse No. 3 of A. S. Witten at Plumb Creek, in the 4th collection district of Virginia, on the 31st day of Jan'y, A. D. 1884, before such spirits shall be removed from such warehouse, and within three years from the date of said entry, then this obligation shall be void; otherwise to remain in full force and virtue.

4 And the said plaintiffs aver that the said Augustus S. Witten did not observe, fulfill, and perform the said condition of the said writing obligatory, but therein wholly failed and made default; and for assigning more particularly a breach of the said writing obligatory the said plaintiffs say that after the making, acknowledging, and delivering of the said writing obligatory, to wit, on the 31st day of January, 1884, the said Augustus S. Witten did have on deposit in his said distillery warehouse 93 gallons of distilled spirits in two barrels, which were deposited during the month ended Jan'y 31st, 1884, to wit, Jan'y 30th, 1884, and that since said distilled spirits were deposited in said distillery warehouse more than three years have elapsed, and that the said A. S. Witten failed to pay or cause to be paid the taxes due and owing on the same unto the collector of internal revenue for the 4th collection district of Virginia within three years from the date of said entry, according to the tenor and effect of said writing obligatory.

5 And the said plaintiffs for assigning a further breach of said writing obligatory say that after making and delivering the said writing obligatory, the said Augustus S. Witten removed or permitted to be removed from his said distillery warehouse distilled spirits, to wit, 93 gals., which were deposited in said distillery warehouse during the month ended Jan'y 31st, 1884, in the two barrels, without paying or causing to be paid the taxes due and owing thereon unto the collector of internal revenue for the 4th collection district of Virginia, according to the tenor and effect of said writing obligatory, and thereby became liable to the United States for $89.05 for taxes due and owing to said plaintiffs (which said sum of money has long since been due and payable) as follows:

To stamp tax on 93 gals. Bourbon whiskey deposited in distillery warehouse Jan'y 30th, 1884, assessed on November, 1886, list	$83.70
5 per cent. penalty	3.68
Int., 1 per cent. per month, to (2 mos.) Jan'y 1st, '87	1.67
	$89.05

6 And the said plaintiffs say that no part of the said sum of $89.05 by the said Augustus S. Witten has been paid to the said plaintiffs, and that so the condition of the said writing obligatory has been broken, and that by reason of the said breach the said writing obligatory became and was forfeited, whereby an action has accrued to the said plaintiffs to have and demand of the said defendants the sum of $261.90 first above demanded. Yet the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiffs the said sum of $261.90 first above demanded, or any part thereof, but to pay the same they have and each of them hath wholly failed and still do fail and refuse so to do, to the damage of the said plaintiffs $261.90, and therefore the said plaintiffs bring their suit.

F. B. HUTTON,
Asst. U. S. Att'y for W. Dist. of Va.

7 (Endorsed:) No. 135. The United States vs. Augustus S. Witten et al. Decl'n in debt. 1887. May R. Decl'n filed & C. O. June R. C. O. C., & set for hearing. 1887. July T. Judg't for deft. by jury.

Bond.

The writing obligatory referred to in the foregoing declaration, together with the endorsements thereon, is in the words and figures following, to wit:

$261.90.

Know all men by these presents,

That we, Augustus S. Witten ———, of Jeffersonville, as principal, and William M. Peery, Jeffersonville, Va., James R. Witten, Jeffersonville, Va., as sureties, are held and firmly bound unto the United States of America in the full and just sum of two hundred and sixty-one dollars and ninety cents (dollars) lawful money of the United States; to which payment, well and truly to be made, we bind ourselves, jointly and severally, our several heirs, executors, and administrators, firmly by
8 these presents. Sealed with our seals and dated this 31st day of Jan'y, A. D. 1884.

The condition of the foregoing obligation is such that if the above bounden principal', or either of them, or the heirs, executors, or administrators of either of them, shall well and truly pay, or cause to be paid, unto the collector of internal revenue for the 4 collection district of Virginia the amount of taxes due and owing on the following-described distilled spirits, to wit:

Date, 1864.	No. barrels.	Wine, gallons.	Proof, gallons.	Taxable, gallons.	Serial numbers of packages.
Jan'y 25	2	82.00	82.00	82.00	13 to
26	1	46.00	45.00	46.00	"
28	1	25.00	25.25	25.00	"
29	1	44.00	44.00	44.00	"
30	2	93.00	93.00	94.00	" 19
Total	7	290.00	290.25	291.00	

which were deposited during the month ended Jan'y 31st, 1884, and entered for deposit in the distillery warehouse No. 3, of A. S. Witten, at Plumb Creek, in the 4th collection district of Virginia, on the 31st day of Jan'y, A. D. 1884, before such spirits shall be removed from such warehouse, and within three years from the date of such entry, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of —

9

S. H. LAIRD,
S. W. KENT.

AUGUSTUS S. WITTEN. [SEAL.]
WILLIAM M. PEERY. [SEAL.]
JAMES R. WITTEN. [SEAL.]

STATE OF VIRGINIA,
County of Tazewell, ss:

I hereby certify that on this 4th day of Feb'y, one thousand eight hundred and eighty-four, before me personally came Augustus S. Witten,

William M. Peery and James R. Witten, known to me to be the individuals described in and who executed the above bond, and severally acknowledged that they executed the same.

[SEAL.] A. T. STARRITT,
Dep'ty Collector.

The foregoing bond is approved by me, the same being executed in due form, and the sureties thereon being satisfactory to me; and I certify that the spirits produced during the month and not covered by this bond have been lawfully withdrawn—being ——— taxable gallons.

[SEAL.] J. B. RAULSTON,
Collector.

10 Endorsements: Distiller's warehousing bond of A. S. Witten, for the month of January, 1884. Distillery warehouse No. 3, 4th district, Virginia.

And at another day, to wit: At an adjourned term of the circuit court of the United States continued and held for the western district of Virginia in the fourth circuit, at Abingdon, on Monday, the 18th day of July, A. D. 1887.

No. 135. UNITED STATES PLAINTIFFS,
vs.
AUGUSTUS S. WITTEN, WILLIAM M. Peery and James R. Witten, defendants. } Suit on warehouse bond.

This day came the parties by their attorneys and the defendants say they have well and truly observed and performed the conditions of the writing obligatory in the declaration mentioned and have not broken their covenant in manner and form as the plaintiffs against them hath complained, and thereupon came a jury, to wit: William Davis, Wm. Jenkins, S. C. Abbott, J. P. Webb, O. W. Powers, Geo. W. Weaver,
11 James Mullin, McCoy Halsey, Swan Hamblin, James Fields, S. I. Duff and Mat Page, who, being duly elected, tried and sworn, and having heard the testimony and the arguments of counsel, retired to their room and afterwards returned into court, having agreed in the following verdict: "We the jury find for the defendants. James Fields," and thereupon the plaintiffs moved the court to set aside the verdict in this cause as contrary to the law and the evidence, which motion after consideration was overruled. Therefore it is considered by the court, that the plaintiff take nothing by his bill, but for his false clamour be in mercy, &c., and that the said defendants go thereof without day.

Memorandum: On the trial of this cause the plaintiffs, by their attorneys, excepted to the opinions of the court, given upon said trial, and tendered their 3 bills of exceptions numbered, respectively, 1, 2, and 3, which were received, signed, and sealed by the court, and ordered to be made a part of the record in said cause.

Costs: Mar., ——; att'y, 20.00; cl'k, 8.65; wits., 18.90.

Exceptions.

The 3 bills of exceptions referred to in the foregoing court order are numbered, respectively, 1, 2, and 3, and are in the words and figures following, to wit:

12 Bill of exceptions No. 1.

THE UNITED STATES OF AMERICA *vs.* A. S. WITTEN, WM. M. PEERY, and Jas. R. Witten. } In debt on distiller's warehousing bond.

Be it remembered that on the trial of this cause the defendants, to sustain the issue on their part, introduced one Samuel C. Leece as a witness, who went in to state that some time in March or April, 1885, or perhaps in the summer of that year, he wrote to the collector of the 4th internal-revenue district of Virginia, at the instance of A. S. Witten, one of the defendants, about the lock on the distillery warehouse of said A. S. Witten, telling him that the same was insecure, and that said warehouse had been broken into; that the staple was either broken or prized off; that he, the witness, sent up a padlock from his house to said Witten with which to lock the warehouse.

13 And that liquor was stolen from said warehouse during time the Government lock was broken, and the warehouse door was fastened with padlock.

To the introduction of this evidence the district attorney objected upon the ground that the same was not competent, and irrelevant, because the defendants were not entitled to be relieved from payment of tax on packages deposited in the warehouse on account of the same having been broken open and liquor stolen therefrom as claimed by them.

But the court overruled the objection and permitted the witness to testify as aforesaid. And to this opinion of the court overruling the said objection, the plaintiff, by said district attorney, excepted, and prays that this first bill of exceptions may be signed, sealed, and made part of the record, which is done accordingly.

JOHN PAUL, [SEAL.]
Dist. Judge.

(Endorsement:) U. S. vs. A. S. Witten, W. M. Peery, J. R. Witten.

14 Bill of exceptions No. 2.

THE UNITED STATES OF AMERICA, *vs.* A. S. WITTEN, WM. M. PEERY, AND JAMES R. Witten. } In debt on distiller's warehousing bond.

Be it remembered that on the trial of this cause, after the plaintiff had proved that the packages referred to and set out in the declaration had been deposited in the warehouse of said A. S. Witten, which was bonded as averred in said declaration, and that the taxes on said packages had

not been paid, but were due and payable, the defendants to sustain the issue on their part, introduced A. S. Witten, one of the defendants and the principal in said bond, as a witness, who went on to state that Government lock was first placed on warehouse and sealed in summer of 1885; that Sam'l Laird, a Government storekeeper, first put it on; that one McLevy, general storekeeper, came to take out a barrel shortly afterwards on his (Witten's) application according to law; that when said McLeevy tried to lock door after barrel removed lock would not work;
15 that McLeevy then knocked lock together with a hammer; that he he then sealed it and went away; that warehouse was open next morning; spring of lock broken; liquor had been stolen; that he, Witten, sent for Mr. Sam'l C. Leece, who was a commissioner of the U. S. circuit court; that Leece came and wrote to the collector of the 4th collection district for him and at his instance, telling said collector about the unsafe condition of warehouse; that Leece sent or brought with him a common padlock and locked door of warehouse and took key home with him; that he reported these facts to the then collector, Mr. Raulston, of the 4th district; that in about a week Mr. McLevy, storekeeper, came, who put padlock on door again and took key off with him; that some weeks after that he applied to take another barrel out of warehouse; that McLevy came again, opened door, took out barrel, locked door again with padlock and carried key off with him. A short time afterwards padlock picked and door opened; that he then sent for two men
16 Peery & Kelly, neighbors of his, who came and fastened the door with another padlock. Some weeks afterwards he applied to have another package taken out of warehouse; McLevy came again, took one barrel, then McLevy fastened door with both padlocks and took both keys with him. Shortly afterwards Revenne Officer Browning came and brought with him a little spring Government lock, with which he fastened the door and then McLevy in a few days came and fastened it with a regular Government lock. Not many days thereafter the staple by which door fastened was bored out of the facing of door; staple clinched on inside; it was bored around with two-inch auger and removed and door opened; that he reported this to the collector of the 4th district and that shortly afterwards he informed said collector by letter that he would not be responsible for the whiskey any longer; to come and get it and make his tax out of it. The collector did not come and he never heard any
17 more about it, but the warehouse was broken into twice after that; that first lock was broken early in the summer of 1885, and the breaking above referred to continued for some six months; that he couldn't fix exact dates, but that during these six months there was stolen from said warehouse three barrels and three half barrels of whiskey; that he does not know whether the particular packages set out in declaration were stolen, but that liquor amounting to the contents of three barrels and three half barrels was stolen; that he selected the warehouse according to law; that afterwards the warehouse in his opinion became an unsafe building in which to store liquor, and that he so notified the collector of the 4th district by letter written by Mr. Samuel C. Leece.

To the introduction of all this evidence the district attorney objected upon the ground that it was not competent, and was irrelevant because the defendants were not entitled to be relieved from payment of tax on pack-

ages deposited in the warehouse on account of the same having been
18 broken open and liquor stolen therefrom as claimed by them, but the court overruled the objection and permitted the witness to testify as aforesaid. And to this opinion of the court overruling the said objection the plaintiff, by said district attorney, excepts and prays that his 2nd bill of exceptions may be signed, sealed, and made part of the record, which is done accordingly.

JOHN PAUL, [SEAL.]
Dist. Judge.

Bill of exceptions, No. 3.

THE UNITED STATES OF AMERICA
vs.
AUGUSTUS S. WITTEN, WM. M. PEERY, AND James R. Witten.
} In debt on distiller's warehousing bond.

Be it remembered that after the jury were sworn to try the issue joined in this cause the plaintiffs, to maintain the said issue on her part, gave in evidence to the jury the books of the 4th collection district, showing that the packages of whiskey on which tax had not been paid as averred in the declaration had been deposited in the defendant A. S. Witten's ware-
19 house and that said tax was not paid and due, and after said A. S. Witten admitted in open court that said packages had been deposited as averred and that he had not paid said tax, and whereupon the defendants to maintain the said issue on their part gave in evidence that the Government lock and seal was first placed on said warehouse in summer of 1885, that a Government storekeeper put it on; that afterwards the general storekeeper came to take out a barrel on the application of said A. S. Witten, the distiller, according to law; that when said Government storekeeper tried to lock the door after barrel taken out lock would not work; that said storekeeper then knocked the lock together with a hammer, sealed it, and went away; that warehouse was open next morning, spring of lock broken, and liquor had been stolen; that said A. S. Witten sent for Mr. Sam'l C. Leece, who was a commissioner of the U. S. circuit court; that Leece came and wrote to Colo. Ralston, then collector 4th dist. of Virginia, for *for* said A. S. Witten, at his instance, telling said collector about the lock and unsafe condition of warehouse; that said Leece brought with him, or sent afterwards, a common padlock with which door of
20 warehouse was locked, and Leece took key home with him; that about a week afterwards one McLeevy, general storekeeper, came to warehouse, locked door with same padlock, and carried key away with him; that some weeks thereafter said Witten applied to remove another barrel; that said McLeevy came again, barrel was taken out, and McLeevy again locked door with same padlock and carried key off; that shortly afterwards padlock was picked and door of warehouse opened; that said Witten then sent for two neighbors, who came and fastened the door of warehouse with another padlock; that some weeks afterwards said Witten applied to remove another package from warehouse, that said McLeevy came again, that barrel was taken out, and McLeevy fastened the door of warehouse with both of said padlocks and took the keys away with him; that shortly afterwards

revenue officer Browning came and brought with him a little spring Government lock with which he fastened the door of the warehouse; that said McLeevy came a few days thereafter and fastened said door with a regular Government lock; that not many days thereafter the staple by which
21 door fastened was bored out of the facing of door; that said staple was clinched on inside; that it was bored around with a two-inch auger and removed and door opened; that said A. S. Witten reported these things to the collector of the 4th district; that shortly thereafter said A. S. Witten informed said collector by letter that he would not be responsible for the whiskey in the warehouse any longer; that said collector must come and get it and make his tax out of it; that said collector did not come and that said A. S. Witten never heard any more about it; that said warehouse was broken into twice after that; that the first lock was broken early in the summer of 1885, and that the breaking above referred to continued during some six months; that the said A. S. Witten could not fix the exact dates of the several breakings as aforesaid; that during these six months there was stolen from said warehouse three barrels and three half-barrels of whiskey; that said Witten did not know whether the particular packages set out in the declaration as packages on which tax had not been paid were stolen, but that whiskey amounting fully to the contents of three
22 barrels and three half-barrels was stolen during the time of said breakings; that said A. S. Witten had selected and designated the warehouse according to law, and it was approved of by the Commissioner of In. Rev.; that afterwards, in the opinion of said A. S. Witten, said warehouse was not a safe building in which to store whiskey, and that he so notified the collector of the 4th district by letter written by Mr. Sam'l C. Leece as aforesaid, and these were all the facts proven. Whereupon the district attorney moved the court to instruct the jury as follows, that is to say:

"If the jury believe from the evidence that the defendant, A. S. Witen, is indebted to the United States in the sum of $83.70 for taxes on 93 gals. Bourbon whiskey entered for deposit in distillery warehouse on January 30, 1884, and that said tax was never paid, as set forth in the declaration, they must find for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of said sum, with penalty added thereto, notwithstanding they may further believe from the evi-
23 dence that at times there were locks placed on the door of said warehouse by the revenue officer having the same in charge such as are not provided for by law, and that at other times the Government locks placed by the revenue officers on the door of said warehouse were insufficient and insecure, and that said warehouse itself was not a secure building, and that during said time said warehouse was broken open and the said whiskey stolen from the same."

But the court refused to give the said instruction to the jury, but instructed the jury as follows, that is to say:

"The jury are instructed that in this cause the plaintiff, having proved the demand made in the declaration, to wit, the sum of $83.70, is entitled to recover that amount from the defendant, as taxes due from the defendant, A. S. Witten, to the Government, and they should find a verdict for that amount, unless the jury shall believe from the evidence that throug' the negligence and default of the officers of the Government the defendant

lost a portion of the whiskey deposited in the bonded warehouse,
24 then as to the number of gallons so lost by the default or negligence of the agents of the Government the defendants are entitled to a reduction of the Government's demand at the rate of ninety cents on the gallon."

To which opinion of the court, refusing said instruction as *as* asked for, and giving the instruction as above set forth, the plaintiff, by said district attorney, excepts and tenders this his 3rd bill of exceptions, and which he prays may be signed, sealed, and made a part of the record in this cause, and the same is done accordingly.

JOHN PAUL, [SEAL.]
Dist. Judge.

24½ (Indorsed:) No. 135. The United States vs. Augustus S. Witten, William M. Peery, and James R. Witten. Suit on warehousing bond. Copy of record. Abingdon, W. D. of Va. circuit court. (Stamp:) Office int. rev. Received Sep. 9, 1887. Law div., sec. 1.

(For the remainder of this record see page 26.—I. C. FOWLER, *Clerk.*)
(Stamp:) Office clerk U. S. courts, Abingdon, Va. I. C. Fowler, clerk.

25 DEPARTMENT OF JUSTICE,
Washington, November 18, 1887.

HENRY C. ALLEN, Esq.,
U. S. Attorney, Woodstock, Va.:

SIR: I send you a copy of the record and proceedings in the case of the United States vs. Augustus S. Witten, William M. Peery, and James R. Witten, No. 135, circuit court of the United States for the western district of Virginia. Sue out a writ of error in this case.

Very respectfully,

A. H. GARLAND,
Attorney-General.

26 And at another day, to wit:

At an adjourned term of the circuit court of the United States continued and held for the western district of Virginia, in the fourth circuit, at Abingdon, on Wednesday, the 8th day of February, A. D. 1888.

Present, honorable John Paul, judge.

In the case of The United States, pltf., vs. Augustus S. Witten, William W. Peery, and James R. Witten, deft's. Action of debt on warehousing bond.

On motion of the district attorney, a writ of error to the Supreme Court of the United States is allowed, and the clerk of this court is directed to issue said writ of error and prepare the citation as required by law.

And on the same day, to wit: On the 8th day of February, A. D. 1888, the clerk of this court, in obedience to the foregoing order, issued the writ of error, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judge of the circuit court of the United States for the western district of Virginia, greeting:

27 Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between the United States and Augustus S. Witten, William M. Peery, and James R. Witten, a manifest error hath happened, to the great damage of the said plaintiffs, as by complaint appears: He, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you; if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, chief justice of the
28 Supreme Court of the United States, this 8th day of February, in the year of Our Lord, one thousand eight hundred and eighty-eight.

I. C. FOWLER,
Clerk of the Circuit Court of the United States for the Western District of Virginia.

[Seal of the C. Ct. of U. S.]

Memorandum: The foregoing writ of error was executed, and by the marshal returned to the Supreme Court of the U. S., at Washington.

And at the same day, to wit: On the 8th day of February, A. D. 1888, the clerk issued a citation, which is in the words and figures following, to wit:

The United States of America to Augustus S. Witten, William M. Perry, and James R. Witten, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's
29 office at the circuit court of the United States for the western district of Virginia, at Abingdon, wherein the United States are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 8th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN PAUL,
U. S. District Judge, West. Dist. of Va.

A copy teste.

I. C. FOWLER,
Clerk C. Ct. U. S., at Abingdon.

[Seal of C. Ct. U. S.]

Memorandum: The foregoing citation was also executed and likewise returned by the marshal to the U. S. Supreme Ct., at Washington.

30 I, I. C. Fowler, clerk of the circuit court of the United States for the western district of Virginia, at Abingdon, in the fourth circuit, do certify that the foregoing is a true and correct copy of the record and proceedings of said court in the case of the United States vs. Augustus S. Witten, William M. Peery, and James R. Witten, No. 135, in debt on warhousing bond.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court this 14th day of September, A. D. 1888.

[SEAL.] I. C. FOWLER,
Clerk of the U. S. Circuit Court, at Abingdon, W. D. Va.

Clerk's fee:

For copy 53 folios, at 15c	$7.95
Seal & certificate	.35
	$8.30

(Indorsement on cover:) No. 151. The United States, plaintiff in error, vs. Augustus S. Witten, William M. Peery, and James R. Witten. W. Virginia, C. C., U. S. Filed October 4, 1888.